Soon Poy Yong @ Soon Puey Yong v Westport Properties Sdn Bhd & Ors

HIGH COURT (SHAH ALAM) — CIVIL SUIT NO 22–329 OF 2005
LIM CHONG FONG JC
30 OCTOBER 2014

Land Law — Indefeasibility of title and interests — Forged transfer — Individual used forged power of attorney and fake land title to transfer plaintiff's land to company — Whether registration of title in company's name void and of no effect despite company not being party to fraud — Whether fake title however not void ab initio as it showed property was registered in plaintiff's name and not someone else's — Whether company's subsequent transfer of land to another party and that party's eventual transfer of the land to another entity valid and indefeasible as subsequent parties were bona fide purchasers for valuable consideration without notice of the fraud — Whether plaintiff indolent in failing to take steps to protect her rights and prevent subsequent transfers of the land from taking place unhindered — Whether plaintiff's claim for negligence against land registering authorities untenable both for non-compliance with ss 5 and 6 of the Government Proceedings Act 1956 and limitation under s 2 of the Public Authorities Protection Act 1948

The plaintiff was the registered owner of a piece of land ('the land') and, at all material times, had in her possession an issue document of title ('IDT1') in respect of the land. Without her knowledge, the second defendant ('D2'), using a falsified power of attorney ('PA') purportedly granted by the plaintiff to him, entered into a sale and purchase agreement to sell the land to the first defendant ('D1') and then signed a memorandum of transfer on the plaintiff's behalf to transfer the land to D1. The 15th defendant ('D15'), as commissioner for oaths, had attested the plaintiff's forged signature in the PA. D1 subsequently sold the land to the seventh defendant ('D7') which, in turn, sold the land to the tenth defendant ('D10') with a charge registered in the name of the 14th defendant ('D14'). When the plaintiff discovered that the land had been transferred to D1, she lodged a private caveat on the land and made a police report that she never agreed to sell the land to D1 nor gave any PA to D2. D1 removed the plaintiff's private caveat by proceedings in the High Court but the plaintiff did not appeal against that decision nor did she apply for an interlocutory injunction to preserve the status quo pending trial. Prior to the trial, the plaintiff withdrew her claim against all the defendants except D1, D2, D7, D10, D14, D15 and the 16th and 19th defendants ('D16' and 'D19'). The claims against D16 and D19 were based on negligence, in that they had breached their duty of care to ensure the plaintiff's interest as registered

proprietor of the land was protected from fraudsters such as D2. The plaintiff contended that as a fake document of title ('IDT2') was used to transfer the ownership of the land from her to D1, the transfer was invalid. She also said D19 did not at any time inform her of the issuance of a new computerised land title to replace the original one she had in her possession. The plaintiff sought for various declarations to have the title of the land re-registered in her name as well as for damages. D1, D7 and D10 claimed they were not liable as they were bona fide purchasers (and, in the case of D14, a bona fide chargee)of the land for valuable consideration.

Held:

(1) The court was satisfied from the evidence that IDT2 was a fake title 'engineered and manufactured' by someone outside the land registry. It was never issued by the land registry. The issue document of title that was properly issued by the land registry in respect of the land was IDT1. However, both the register document of title and IDT1 and IDT2 showed the land was registered in the plaintiff's name. Thus, the fake IDT2 was not a title that was void ab initio. IDT2 was merely a forged title used for the conveyance of the land to D1 that attracted defeasibility pursuant to s 340(2)(b) of the National Land Code1965. The transfer of the land and registration of the title in the name of D1 was bad in law and defeasible but this did not nullify any conveyance or dealing in the land (see paras 48, 59, 62 & 126(a)).

(2) A title registered and issued by the land registry would be void ab initio in narrow and limited factual circumstances. This would occur when the land registry wrongfully registered and issued a replacement title in the name of another person thereby depriving the original title holder of his constitutional right to ownership of land. The title would not be void ab initio if the land registry was duped into issuing a replacement title in continuation in the name of the original title holder (see paras 46–47).

(3) The court found D2 had forged or caused the forgery of the plaintiff's signature in the PA, that he (IDT2 and that he signed the sale and purchase agreement and the memorandum of transfer on the plaintiff's behalf without her authorisation to defraud her. D1 neither conspired with D2 nor was a party to D2's fraud (see paras 56–57, 126 (b) & (c)).

(4) Prima facie, the sale of the land by D1 to D7 in 2007 (seven years after D1 bought the land and two years after the plaintiff's private caveat was removed by the court) suggested there was unlikely fraud or conspiracy on the part of D7 to defraud the plaintiff. The court was satisfied from the evidence that D7 was a bona fide purchaser of the land from D1 for valuable consideration and had no knowledge of the fraud committed by D2 in respect of the land. Accordingly, notwithstanding the registration of the title in D1's name was bad in law, the subsequent registration of the

title in D7's name was indefeasible pursuant to s 340(3) of the NLC (see paras 67, 73, 75 & 126(e)).

(5) The court found the dealings in the land involving D7, D10 and D14 were ordinary, arms-length commercial transactions and that they had no knowledge whatsoever of the fraud committed by D2 in respect of the land; that D10 and D14 were, respectively, bona fide purchaser and chargee for valuable consideration and that their respective registrations were valid and indefeasible under s 340(1) and the proviso to s 340(3) of the NLC (see paras 86–87).

(6) The plaintiff was indolent after her private caveat was removed by D1. She was not proactive to protect her interests. Had the necessary protective measures been taken, the subsequent transfers of the land to D7 and D10 might have been avoided. The plaintiff was disentitled from pursuing her claim against D10 because of laches and acquiescence. It was inequitable for her to reclaim her title from D10 after she had, by her inaction, permitted D10 to buy the land unrestrained (see para 93).

(7) The evidence adduced by the plaintiff was inadequate to prove beyond reasonable doubt that D15 conspired with D2 nor was party to D2's fraud (see paras 100 & 126 (h)).

(8) The plaintiff's case against D16 and D19 was not maintainable both procedurally and substantively. They were not negligent and the plaintiff was barred from pursuing her claim against them because of failure to include the appropriate parties in this suit in contravention of ss 5 and 6 of the Government Proceedings Act 1956 as well as limitation pursuant to s 2 of the Public Authorities Protection Act 1948 (see paras 111–112, 119–120, 122, 125 & 126 (i)).

[Bahasa Malaysia summary

Plaintif ialah pemilik berdaftar sebidang tanah ('tanah tersebut') dan, pada setiap masa matan, mempunyai milikan surat ikatan hak milik ('SIHM') berkaitan tanah tersebut. Tanpa pengetahuannya, defendan kedua ('D2'), dengan menggunakan surat kuasa wakil yang dipalsukan ('SKW') dikatakan telah diberikan oleh plaintif kepadanya, telah memasuki perjanjian jual beli untuk menjual tanah tersebut kepada defendan pertama ('D1') dan kemudian telah menandatangani memorandum pindah milik bagi pihak plaintif untuk memindah milik tanah tersebut kepada D1. Defendan ke 15 ('D15'), sebagai pesuruhjaya sumpah, telah mengaku saksi tandatangan palsu plaintif dalam SKW itu. D1 kemudiannya telah menjual tanah tersebut kepada defendan ketujuh ('D7') yang mana, sebaliknya, telah menjual tanah tersebut kepada defendan kesepuluh ('D10') dengan gadaian didaftarkan atas nama defendan ke 14 ('D14'). Apabila plaintif mendapati bahawa tanah tersebut telah dipindah milik kepada D1, dia telah memasukkan kaveat persendirian ke atas tanah tersebut dan membuat laporan polis bahawa dia tidak pernah bersetuju

untuk menjual tanah tersebut kepada D1 atau memberi apa-apa SKW kepada D2. D1 telah membatalkan kaveat persendirian plaintif melalui prosiding di Mahkamah Tinggi tetapi plaintif tidak merayu terhadap keputusan tersebut ataupun memohon untuk injunksi interlokutori bagi mengekalkan status quo sehingga perbicaraan. Sebelum perbicaraan, plaintif menarik balik tuntutannya terhadap semua defendan kecuali D1, D2, D7, D10, D14, D15 dan defendan-defendan ke 16 dan ke 19 ('D16' dan 'D19'). Tuntutan-tuntutan terhadap D16 dan D19 adalah berasaskan kecuaian, di mana mereka telah melanggar kewajipan berjaga-jaga mereka bagi memastikan kepentingan plaintif sebagai pemilik berdaftar tanah tersebut dilindungi daripada penipu seperti D2. Plaintif berhujah oleh kerana surat ikatan hak milik palsu ('SIHM2') telah digunakan untuk memindah milik pemilikan tanah tersebut daripadanya kepada D1, pindah milik itu adalah tidak sah. Dia juga menyatakan D19 tidak pada bila-bila memberitahunya tentang keluaran hak milik tanah berkomputer baru itu untuk menggantikan yang asal dalam milikannya. Plaintif memohon pelbagai deklarasi agar hak milik tanah tersebut didaftar semula atas namanya dan juga untuk ganti rugi. D1, D7 dan D10 mendakwa mereka tidak bertanggungjawab kerana mereka adalah pembeli suci hati (dan, dalam kes D14, pemegang gadaian suci hati) tanah tersebut untuk balasan bernilai.

Diputuskan:

(1) Mahkamah berpuas hati berdasarkan keterangan bahawa SIHM2 adalah hak milik palsu yang '*engineered and manufactured*' oleh seseorang luar daripada pejabat daftar tanah. Ia tidak pernah dikeluarkan oleh pejabat daftar tanah. Surat ikatan hak milik yang dikeluarkan oleh pejabat daftar tanah berkaitan tanah tersebut adalah SIHK1. Walau bagaimanapun, kedua-dua daftar surat ikatan hak milik SIHM1 dan SIHM2 menunjukkan tanah tersebut telah didaftarkan atas nama plaintif. Oleh itu, SIHM2 yang palsu bukan hak milik yang terbatal *ab initio*. SIHM2 hanya hak milik palsu yang digunakan untuk pemindah hakkan tanah tersebut kepada D1 yang menimbulkan suatu yang boleh disangkal menurut s 340(2)(b) Kanun Tanah Negara 1965. Pindah milik tanah tersebut dan pendaftaran hak milik atas nama D1 tidak berkesan dari segi undang-undang dan boleh disangkal tetapi ini tidak membatalkan apa-apa pemindah milikan atau urusan atas tanah tersebut (lihat perenggan 48, 59, 62 & 126(a)).

(2) Suatu hak milik berdaftar dan yang dikeluarkan oleh pejabat daftar tanah akan menjadi terbatal *ab initio* dalam keadaan faktual yang sempit dan terhad. Ini berlaku apabila pejabat daftar tanah tersalah mendaftar dan mengeluarkan hak milik gantian atas nama seorang yang lain yang menafikan pemegang hak milik salah hak perlembagaannya untuk pemilikan tanah tersebut. Hak milik itu tidak menjadi terbatal *ab initio* jika pejabat daftar tanah itu ditipu dalam mengeluarkan hak milik

gentian demi meneruskan nama pemegang hak milik asal (lihat perenggan 46–47). A

(3) Mahkamah mendapati D2 telah memalsu atau menyebabkan pemalsuan tandatangan plaintif atas SIKW itu, bahawa dia telah '*engineered and manufactured*' IDT2 dan bahawa dia telah menandatangani perjanjian jual beli dan memorandum pemindahan bagi pihak plaintif tanpa pemberian kuasanya untuk menipunya. D1 tidak bersubahat dengan D2 dan bukan pihak kepada penipuan D2 (lihat perenggan 56–57, 126 (b) & (c)). B

(4) Secara prima facie, jualan tanah itu oleh D1 kepada D7 pada tahun 2007 (tujuh tahun selepas D1 membeli tantah tersebut dan dua tahun selepas kaveat persendirian plaintif dibatalkan oleh mahkamah) mencadangkan tidak mungkin terdapat fraud atau konspirasi di pihak D7 untuk menipu plaintif. Mahkamah berpuas hati berdasarkan keterangan bahawa D7 adalah pembeli suci hati tanah tersebut daripada D1 untuk balasan bernilai dan tidak mempunyai pengetahuan tentang penipuan yang dilakukan oleh D2 berkaitan tanah tersebut. Sewajarnya, meskipun pendaftaran hak milik atas nama D1 tidak sah dari segi undang-undang, pendaftaran berikut hak milik atas nama D7 tidak boleh disangkal menurut s 340(3) KTN (lihat perenggan 67, 73, 75 & 126(e)). C D E

(5) Mahkamah mendapati urusan atas tanah tersebut melibatkan D7, D10 dan D14 adalah transaksi komersial yang biasa dan bahawa mereka tidak mempunyai pengetahuan apa pun tentang fraud yang dilakukan oleh D2 berkaitan tanah tersebut; bahawa D10 dan D14 adalah pembeli suci hati dan pemegang gadaian untuk balasan bernilai dan bahawa pendaftaran mereka adalah sah dan tidak boleh disangkal di bawah s 340(1) dan proviso s 340(3) KTN (lihat perenggan 86–87). F

(6) Plaintif menjadi malas selepas kaveat persendiriannya dibatalkan oleh D1. Dia tidak proaktif untuk melindungi kepentingannya. Jika langkah-langkah perlindungan yang perlu diambil, pemindah hakan milik tanah selanjutnya kepada D7 dan D10 mungkin boleh dielakkan. Plaintif dilucut hak daripada meneruskan tuntutannya terhadap D10 kerana kecuaian kelewatan dan persetujuan. Ia tidak saksama untuknya menuntut semula hak miliknya daripada D10 selepas dia, kerana dia tidak mengambil apa-apa tindakan, membenarkan D10 membeli tanah tersebut tanpa apa-apa sekatan (lihat perenggan 93). G H

(7) Keterangan yang dikemukakan oleh plaintif tidak mencukupi untuk membuktikan melampaui keraguan munasabah bahawa D1 bersubahat dengan D2 atau bukan pihak kepada fraud D2 (lihat perenggan 100 & 126(h)). I

(8) Kes plaintif terhadap D16 dan D19 tidak boleh dikekalkan sama ada secara prosedural dan substantif. Mereka tidak cuai dan plaintif dihalang

daripada meneruskan tuntutannya terhadap mereka kerana kegagalan memasukkan pihak-pihak sesuai dalam guaman ini yang bertentangan dengan ss 5 dan 6 Akta Prosiding Kerajaan 1956 dan juga had masa menurut s 2 Akta Perlindungan Pihak Berkuasa Awam 1948 (lihat perenggan 111–112, 119–120, 122, 125 & 126 (i)).]]]

Notes

For cases on forged transfer, see 8(3) *Mallal's Digest* (5th Ed, 2015) paras 3661–3674.

Cases referred to

Adorna Properties Sdn Bhd v Boonsom Boonyanit [2001] 1 MLJ 241; [2001] 2 CLJ 133, FC (refd)

Ambank (M) Bhd v Abdul Aziz Hassan & Ors [2010] 3 MLJ 784; [2010] 7 CLJ 663, CA (refd)

Ang Hiok Seng @ Ang Yeok Seng v Yim Yut Kiu (personal representative of the estate of Chan Weng Sun, deceased) [1997] 2 MLJ 45, FC (refd)

Au Meng Nam v Ung Yak Chew & Ors [2007] 5 MLJ 136; [2007] 4 CLJ 526, CA (refd)

Boonsom Boonyanit @ Sum Yok Eng v Adorna Properties Sdn Bhd [1995] 2 MLJ 863; [1995] 2 AMR 1828, HC (refd)

Bumiputra-Commerce Bank Bhd v Augusto Pompeo Romei & Anor [2014] 3 MLJ 672; [2014] 6 CLJ 27, CA (refd)

CGU Insurance Bhd v Asean Security Paper Mills Sdn Bhd [2002] 2 MLJ 1, FC (refd)

CIMB Bank Bhd v Abdul Rafi a/l Abdul Rajak & Ors [2012] MLJU 804, HC (refd)

Chu Choon Moi v Ngan Siew Tin [1986] 1 MLJ 34, SC (refd)

Citibank N.A. v Mrs N. D. Chandrasegaran Nee Nirmala Devi a/p P Ratnadurai [2007] 8 MLJ 149, HC (refd)

Dato Toh Kian Chuan v Swee Construction and Transport Company (Malaya) Sdn Bhd [1996] 1 MLJ 730, HC (refd)

Director of Forests Sarawak & Anor v Balare Jabu & Ors and Another Appeal [2012] 7 CLJ 685, FC (refd)

Government of the State of Sabah v Syarikat Raspand [2010] 5 MLJ 717; [2010] 7 CLJ 945, CA (refd)

Govindasamy s/o Muthulingam v Ooi Kee Chye & Anor [2012] 7 MLJ 254; [2012] 1 CLJ 875 (refd)

Haji Hussin bin Haji Ali & Ors v Datuk Haji Mohamed bin Yaacob & Ors and connected cases [1983] 2 MLJ 227; [1983] CLJ(Rep) 165, FC (refd)

Jaswant Singh v Central Electricity Board and Anor [1967] 1 MLJ 272 (refd)

Kerajaan Malaysia & Ors v Lay Kee Tee & Ors [2009] 1 MLJ 1; [2009] 1 CLJ 663, FC (refd)

Lim Chui Lai v Zeno Limited [1964] 30 MLJ 314, FC (refd)

M Ratnavale v S Lourdenadin [1988] 2 MLJ 371, SC (refd)

OCBC Bank (M) Bhd v Lee Lee Fah & Ors and Another Appeal [2000] 1 MLJ 134, CA (refd)
Ong Ban Chai & Ors v Seah Siong Mong [1998] 3 MLJ 346, CA (refd)
Overseas Reality Sdn Bhd v Wong Yau Choy [2014] 3 AMR 703, HC (refd)
Phua Lee Hui lwn Kee Po King dan satu lagi [2011] MLJU 1143; [2012] 2 CLJ 941, HC (refd)
Sanmaru Overseas Marketing Sdn Bhd v PT Indofood International Corp & 2 Others [2009] 2 MLJ 765; [2009] 2 AMR 309, CA (refd)
Shayo (M) Sdn Bhd v Nurlieda bt Sidek & Ors [2013] 7 MLJ 755, HC (refd)
Shell (M) Trading Sdn Bhd v Tan Bee Leh @ Tan Yue Khoen & Ors [2013] 8 MLJ 533 (refd)
State Tailor Sdn Bhd v Nallapan [2005] 2 MLJ 589, CA (refd)
Subramaniam a/l NS Dhurai v Sandrakasan a/l Retnasamy & Ors [2005] 6 MLJ 120, CA (refd)
Tai Lee Finance Co Sdn Bhd v Official Assignee & Ors [1983] 1 MLJ 81, FC (refd)
Tan Ah Chim & Sons Sdn Bhd v Ooi Bee Tat & Anor [1993] 3 ML J 633, HC (refd)
Tan Chiw Thoo v Tee Kim Kuay [1997] 2 MLJ 221, FC (refd)
Tan Kok Chuan & Anor v Liew Nam Foong [2000] MLJU 76; [2000] 5 CLJ 533, HC (refd)
Tan Ying Hong v Tan Sian San & Ors [2010] 2 MLJ 1; [2010] 2 CLJ 269, FC (refd)
Teh Bee v K Maruthamuthu [1977] 2 MLJ 7, FC (refd)
Tenaga Nasional Berhad v Kesang Trading Sdn Bhd [2002] 6 MLJ 1; [2002] 7 CLJ 200, HC (refd)
Tiarasetia Sdn Bhd v Yayasan Selangor & Anor [2009] MLJU 1602, HC (refd)
Uptown Properties Sdn Bhd v Pentadbir Tanah Wilayah Persekutuan & Ors [2012] 8 MLJ 713, HC (refd)
Yap Ham Seow v Fatimawati Ismail & Ors [2014] 1 MLJ 645; [2013] 9 CLJ 577, CA (refd)
Yew Foo Chun v Wong Nye Keong & Ors [2014] 1 LNS 189, HC (refd)
Yii Soon Ho v PP [2014] MLJU 409; [2014] 1 LNS 386, CA (refd)

Legislation referred to

Civil Law Act 1956 s 11
Evidence Act 1950 ss 45, 85, 114(g)
Government Proceedings Act 1956 ss 5, 6
Limitation Act 1953 ss 6, 9, 29, 32
National Land Code ss 22, 211, 319(1)(a), 340, 340(2), (b), (c), (3), (4), 418, Fourth Schedule, Fifth Schedule, 14th Schedule
Commissioners for Oaths Rules 1993 rr 13, 14, 14(1)
Penal Code s 199
Powers of Attorney Act 1949 s 3, 3(2)
Public Authorities Protection Act 1948 s 2, 2(a)

Rules of Court 2012 O 18 r 19
Stamp Act 1949

Ooi Chih Jen (Chris SH Lim and Sharon Palani with him) (Chris Lim Su Heng) for the plaintiff.
Tan Chee Keong (Tee Tai Tzian with him) (CK Tan & Co) for the first and third to sixth defendants.
Alex Yow Kian Hooi (Chambers of Low & Yow) for the seventh to ninth defendants.
Rajinder Kaur (S Rajinder & Co) for the tenth to 13th defendants.
Teo Cheng Wee (Yong Juk Chee with him) (Khaw & Partners) for the 14th defendant.
Maureen Ong Swee Kin (Low & KH Boo) for the 15th defendant.
Kam bt Sani (Legal Advisor Office, State of Selangor Darul Ehsan) for the 16th and 19th defendant.

Lim Chong Fong JC:

INTRODUCTION

[1] This is yet another of the land scam cases of the type seen in *Boonsom Boonyanit @ Sum Yok Eng v Adorna Properties Sdn Bhd* [1995] 2 MLJ 863; [1995] 2 AMR 1828.

[2] The plaintiff was the registered proprietor of the piece of land held under lot 507, Geran Mukim 555, Mukim Teluk Panglima Garang, Negeri Selangor Darul Ehsan ('land').

[3] The first defendant is a private limited company and the third to the sixth defendants are the directors of the first defendant. The first defendant purchased the land from the second defendant who purportedly acted as the agent of the plaintiff.

[4] The second defendant is an individual.

[5] The seventh defendant is a private listed company and the eight and ninth defendants are the directors of the seventh defendant. The seventh defendant purchased the land from the first defendant.

[6] The tenth defendant is another private listed company with the 11th to 13th defendants being its directors. The tenth defendant purchased the land from the seventh defendant.

[7] The 14th defendant is one of the major commercial banks in Malaysia.

The 14th defendant financed the tenth defendant's purchase of the land from the seventh defendant.

[8] The 15th defendant is a commissioner for oaths who attested to the power of attorney purportedly given by the plaintiff to the second defendant.

[9] The 16th defendant and 19th defendant are state agencies involved in the land transactions.

[10] The 17th defendant and 18th defendant were advocates and solicitors appointed by the second defendant and involved in the conveyance of the land purportedly from the plaintiff to the first defendant. The 17th defendant passed away on 28 August 2012 whilst the 18th defendant is untraceable and believed to be now living abroad.

THE TRIAL PROCESS

[11] The trial of this action took a week on 28–30 May 2014 and 17–20 June 2014. Prior to the commencement of the trial, the plaintiff withdrew her claim against the third to sixth defendants, eighth and ninth defendants, 11th to 13th defendants, 17th defendant and 18th defendant.

[12] The trial documents including the documentary evidence were compiled in bundles A, B, C, D1 to D7, E1 to E6, F1 to F6, G1 to G2, H, I, J1 to J2, K and L and exhs P1 to D23.

[13] Eighteen witnesses testified at the trial and they were as follows:

The plaintiff

(a) Khor Tin Yeow (PW1), the plaintiffs son;

(b) Lim Yok Chaw (PW2), a forensic document examiner and hand writing expert;

(c) Soon Poy Yong (PW3), the plaintiff herself; and

(d) Tan Keng Heng (PW4), a registered valuer.

The first defendant

(a) Koo Kon Seng (DW1), a director and shareholder of the first defendant company; and

(b) Tee Sin Yap (DW2), also a director and shareholder of the first defendant company.

The seventh defendant

(a) Lee Eng Hong (DW3), a director of the seventh defendant company; and

(b) Thashinamoorthy a/l Paramaguru (DW4), the seventh defendant's solicitor involved in the conveyance of the land from the first defendant to the seventh defendant.

The tenth defendant

(a) Teh Cheng Choo (DW5), a director of the tenth defendant company;

(b) Woon Oi Gee (DW6), a real estate negotiator; and

(c) Anthony Chua Kian Beng (DW7), a registered valuer.

The 14th defendant

(a) Lee Siew Choon (DW8), vice president of the wholesale loan technology and operations department of the bank.

The 15th defendant

(a) Dr Khor Hui Min (DW10), a specialist in geriatric medicine; and

(b) Tee Kian (DW12), the 15th defendant himself.

The 16th and 19th defendants

(a) Raja Azhar bin Raja Alias (DW9), deputy land officer at the Hulu Langat land office;

(b) Norazlina Abu Bakar (DW11), assistant administration officer at the Kuala Langat land office;

(c) Shaliza bt Fauzi (DW13), assistant administration officer at the Kuala Langat land office; and

(d) Noor Diyana bt Remey (DW14), deputy district officer at the Kuala Langat land office.

[14] After the close of trial, the parties concurrently submitted their respective written arguments in chief followed by their written arguments in reply. There was oral clarification with counsels on 30 September 2014 and 13 October 2014.

BACKGROUND FACTS

[15] The land was originally jointly owned and registered in the names of Yap Chan Yong @ Yap Hock Yong and Yee Kim Lai @ Yee Kim Yong with each holding half undivided shares.

[16] In 1985, the land was transferred to the plaintiff and registered in the plaintiff's name on 12 December 1985. The plaintiff held an original manual issue document of title in respect of the land ('IDT1'). This IDT1 was at all times in the custody and control of the plaintiff and kept in the safety box jointly registered in the name of PW1 and his wife in the OCBC Bank Jalan Stesyen in Klang, Selangor. The original IDT1 was produced in court and a photocopy of IDT1 was marked as exh P2 as well as included in bundle C tab 3.

[17] By way of a power of attorney dated 8 January 1997 ('power of attorney') purportedly granted by the plaintiff to the second defendant, the second defendant had on 25 January 2000 executed a memorandum of transfer on behalf of the plaintiff to transfer the land to the first defendant. This transfer was executed pursuant to a sale and purchase agreement also dated 25 January 2000 entered into between the second defendant and the first defendant in respect of the land for RM360,000.

[18] The land was registered in the name of the first defendant on 15 March 2000. The photocopy of the manual issue document of title ('IDT2') that showed the registration of the land in the name of the plaintiff on 12 December 1985 and of the first defendant on 15 March 2000 was also produced in court in bundle C tab 4.

[19] In mid June 2003, the plaintiff and PW1 met a Lee Chin Yau who enquired whether the plaintiff was interested to sell the land. The plaintiff responded she would likely consider selling the land if the proposed purchase price was satisfactory. Accordingly, PW1 was instructed by the plaintiff to hand a photocopy of IDT1 to Lee Chin Yau to show to interested purchasers of the land.

[20] Subsequently Lee Chin Yau contacted PW1 and informed him that DW1 had already purchased the land from an individual who held a power of attorney given by the plaintiff.

[21] The plaintiff and PW1 accordingly on 25 June 2003 made an official land search at the Kuala Langat district land office and discovered that the land had been transferred to the first defendant and registered in the name of the first defendant on 15 March 2000.

[22] After the discovery of the transfer and registration of the land to the first defendant, the plaintiff on 16 July 2003 entered a private caveat to protect her interest. The plaintiff also made a police report on 12 July 2003 stating that she neither sold nor agreed to sell the land. Also, she did not give any power of attorney to the second defendant.

[23] By a letter dated 29 January 2004, the plaintiff through her solicitors, Messrs Lovelace & Hastings wrote to the 19th defendant and sought for a meeting with the land administrator of the 19th and defendant to clarify on the transfer of the land to the first defendant. It is unclear if that meeting took place.

[24] The 19th defendant by a letter dated 28 April 2004 responded to another letter of Messrs Lovelace & Hastings dated 4 March 2004 that the IDT2 had been returned to Messrs KC Yap & Partners, the solicitors of the first defendant.

[25] The plaintiff then through Messrs Lovelace & Hasting's letter dated 26 November 2004 wrote to the 19th defendant to enter a registrar's caveat to protect the plaintiff's interest as the legal and beneficial owner of the land. However, the 19th defendant by a letter dated 12 December 2004 replied that it was unnecessary because the plaintiff had already entered a private caveat on the land since 16 July 2003 and the original computerised issue document of title of the land in the name of the first defendant was still being kept by the 19th defendant. The plaintiff was also advised to take the necessary legal action based on the police report lodged by the plaintiff.

[26] The plaintiff commenced this action on 19 April 2005 against the first and second defendants only.

[27] The private caveat that was lodged by the plaintiff on 16 July 2003 was removed by the court on 27 May 2005 pursuant to the application of the first defendant vide Shah Alam High Court Suit No MT1-25–1530 of 2004. This caveat removal order was not appealed by the plaintiff to the Court of Appeal. The plaintiff did not also apply for an interlocutory injunction in this action to preserve the status quo pending trial.

[28] The first defendant then on 24 December 2007 by a sale and purchase agreement sold the land to the seventh defendant for RM900,000 and the land was registered in the name of the seventh defendant on 26 March 2008. The photocopy of the computerised issue document of title of the land in the name of the seventh defendant ('IDT3') was produced in court in bundle H tab 26.

[29] Subsequently, the seventh defendant on 20 July 2011 entered into a sale

and purchase agreement with the tenth defendant for the sale of the land for RM3,104,273. In order to part finance the purchase of the land, the tenth defendant obtained from the 14th defendant a fixed loan facility in the sum of RM1m and an overdraft facility in the sum of RM500,000. The land was registered in the name of the tenth defendant with a charge also registered in the name of the 14th defendant on 19 December 2011. The photocopy of the computerised issue document of title of the land ('IDT4') the original of which is presently in the possession of the 14th defendant, was also produced in court in bundle J pp 255–258.

[30] To date the land is the possession of the tenth defendant.

CONTENTIONS AND FINDINGS

[31] Generally the plaintiff sought for various declarations primarily to have the title of the land re-vested and re-registered in her name as well as compensation of damages from many of the defendants as prayed in para 49 of the re-amended statement of claim.

[32] Although fraud and conspiracy were originally pleaded against the seventh, tenth and 14th defendants, the plaintiff after reviewing the evidence adduced at trial had on 4 September 2014 in its closing submission in chief conceded that fraud and conspiracy weren't maintainable against them. This concession was due to lack of cogent evidence to satisfy the high standard of proof required.

[33] By reason that the facts are rather complex involving many parties and issues, I will deal with them systematically in the following order:

(a) first and foremost, I will determine the issue as to whether the title and hence the conveyance of the land to the first defendant were void ab initio and if so, whether this conveyance as well as all the subsequent conveyances were accordingly also nullities. If those subsequent conveyances were not nullities, then the title can only in principle revert to the plaintiff if the registered title then in the names of the tenth defendant followed by the seventh defendant and finally the first defendant were each defeasible and avoided in that specific order;

(b) next, I will consider the issue of the alleged fraud and conspiracy committed by the second defendant jointly with the first defendant. The first defendant claimed to be the bona fide purchaser of the land for valuable consideration. Besides compensation in damages if fraud and conspiracy is found against them, this finding is necessary to determine if

A the title to the land then registered in the name of the first defendant was defeasible if the title then registered in the name of the seventh defendant is avoided;

(c) I will follow on to determine whether the title then registered in the name B of the seventh defendant was defeasible which is relevant if the title now registered in the name of the tenth defendant is avoided. The seventh defendant similarly claimed to be the bona fide purchaser of the land for valuable consideration claiming through or under the first defendant;

C (d) thereafter, I will determine if the title and charge concurrently registered in the names of the tenth defendant and the 14th defendant respectively were defeasible. Both also claimed to be the bona fide purchaser and chargee for valuable consideration claiming through or under the seventh defendant;

D (e) following that, I will then deal with the alleged fraud and conspiracy committed by the 15th defendant which sounds only in compensatory damages if proven; and

(f) finally, I will determine whether the 16th defendant and 19th defendant E were negligent and accordingly liable to compensate the plaintiff in damages.

TITLE AND CONVEYANCE VOID AB INITIO

F **[34]** Generally, s 340 of the National Land Code 1965 provides:

(1) The title or interest of any person or body for the time being registered as a proprietor of any land, or in whose name any lease, charge or easement is, for the time being registered shall, subject to the following provisions of this section shall be indefeasible.

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(2) The title or interest of any such person or body shall not be indefeasible.

(a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or

H (b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or

(c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.

I

(3) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in sub-section (2)–

(a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and

(b) any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested:

Provided that nothing in this sub-section shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser.

(4) Nothing in this section shall prejudice or prevent–

(a) the exercise in respect of any land or interest of any power of forfeiture or sale conferred by this Act or any other written law for the time being in force, or any power of avoidance conferred by any such law; or

(b) the determination of any title or interest by operation of law.

[35] The plaintiff contended that the land was wrongfully transferred to the first defendant on 15 March 2000 through a fake document of title IDT2 because the original title IDT1 was at all material times in the possession of the plaintiff. The fake document of title was procured by way of fraud or forgery. In this regard, the plaintiff principally relied on the testimony of PW1 and PW3 that the IDT1 was kept safely in the OCBC bank depository in Klang. Moreover neither the plaintiff nor her son PW1 was informed by the 19th defendant of anything in relation to the issuance of a new land title in replacement of the earlier title. The plaintiff also made a comparison of IDT1 and IDT2 against the issue document of title of the neighbouring land to wit: Lot 506. The physical characteristics both in the format and contents in IDT1 but not IDT2 matched that of the neighbouring land. In the premises, the plaintiff submitted that IDT1 must by inference be the original title issued by the 19th defendant and IDT2 was accordingly the fake title used for transfer of the ownership of the land from the plaintiff to the first defendant.

[36] Furthermore as testified by PW3, the plaintiff herself, she never gave any power of attorney to the second defendant. She neither sold and transferred the land to anyone nor received any money from the first defendant, second defendant or anyone else. The land was purportedly sold by the plaintiff to the second defendant by way of a sale and purchase agreement dated 5 June 1996 for RM350,000 without her knowledge. The second defendant did not however transfer and register the land in his name. He instead on behalf of the plaintiff entered into a sale and purchase agreement with DW1 dated 21 December 1999 for the sale of the land also for RM350,000. This sale and purchase agreement was later rescinded and substituted with a new sale and purchase agreement between the second defendant on behalf of the plaintiff and the first defendant. These facts were only discovered by the plaintiff in 2003 and the plaintiff on 16 July 2003 entered a private caveat besides lodging a police report earlier on 12 July 2003.

[37] As to the legal effect, the plaintiff relied on the case of *Shayo (M) Sdn*

Bhd v Nurlieda bt Sidek & Ors [2013] 7 MLJ 755 particularly the following dicta of Harminder Singh J at p 769 para 35–36:

> *I would also add for the avoidance of any doubt that in view of the void title at its inception subsequent bona fide purchasers for value cannot avail themselves to the protection as provided by the proviso to sub-s (3) of s 340 of the NLC. Admittedly, this appears to go against the principle of conclusiveness of the register of titles under the Malaysian Torrens System. However, as mentioned earlier, this was really a case of clash of titles, the second of which was issued ultra vires the NLC rendering it unlawful. An unlawful title cannot provide the basis for conclusiveness.*
>
> In this regard as well, a distinction must be drawn between the instant case and other cases such as *Adorna Properties Sdn Bhd v Boonsom Boonyanit @ Sum Yok Eng* [2001] 1 MLJ 241 and *Tan Ying Hong v Tan Sian San & Ors* [2010] 2 MLJ 1 In *Adorna Properties*, a fraudster impersonated Mrs Boonsom Boonyanit, forged her signature and obtained a properly issued duplicate title and used it to deal with the land. In *Tan Ying Hong*, an imposter forged a power of attorney and executed two charges upon the land, which charges were registered in compliance with the NLC. In these two cases, and most other cases as well, the instruments under attack were the subsidiary instruments and not the title itself In other words there was no issue with respect to the title being good and valid or otherwise in those cases. (Emphasis added.)

[38] The plaintiff also relied on the case of *Uptown Properties Sdn Bhd v Pentadbir Tanah Wilayah Persekutuan & Ors* [2012] 8 MLJ 713 where Prasad Abraham J (as he then was) said at p 725 para 19:

> On the upshot, the mistake of the first, second and third defendants describing the registered proprietor of the said land as the fourth defendant was unlawful, the application for the issue of a duplicate computerised title on the basis the original title was lost and the subsequent issue of a duplicate title was null and void. The issuing of a computerised title to the fourth defendant as a registered proprietor when the original title to the said land continued to be in the possession of the plaintiff was ultra vires as it contravened the provisions of the National Land Code (Amendment Act 1992 (Act 832 of 1992) s 5A and the 14th Schedule and the same was a contravention of s 340(2)(c) of the National Land Code. It follows therefore any instrument executed by the director of the fourth defendant would be void and insufficient per se (see s 340(2)(b) of the NLC).

[39] According to the plaintiff, both the cases were direct proposition that a void title such as the fake IDT2 could not be used to validly register any transfer of title or interest based on the doctrine of *nemo dat quod non habet* as propounded in the case of *Lim Chui Lai v Zeno Limited* [1964] 1 MLJ 314. Thus, Gopal Sri Ram JCA (as he then was) in the Court of Appeal case of *Subramaniam a/l NS Dhurai v Sandrakasan a/l Retnasamy & Ors* [2005] 6 MLJ 120 at p 124 observed that:

> A purchaser of land might fail to obtain a good title in two distinct ways. Firstly, if the title of the vendor is bad. secondly, even if the vendor has a good title, there

might be some invalidating defects in the conveyance or transaction in which the purchaser attempted to obtain the title. These transactions might be void or voidable for a variety of reasons. *In the case of a defect in the vendor's title, the common law rule, is that no person can give a better title than he had - nemo dat quod non habet.* There, are however, important exceptions to this rule, in particular the qualification made under the proviso to s 340(3) of our National Land Code 1965 where a bona fide purchaser for value without notice of the defeasible nature of the vendor's title acquires an immediate indefeasible title. In the case where the vendor's title is good but the instrument which was used by a purchaser for registration is void or voidable, the effect on such registration will only confer on the person in whose name the land is registered, what is usually referred to as the deferred indefeasibility – see *Gibbs v Messer* [1891] AC 248. Under this principle, the registration of the insufficient or void instrument can be set aside. (Emphasis added.)

[40] The plaintiff to bolster her point also cited the Federal Court case of *Tan Chiw Thoo v Tee Kim Kuay* [1997] 2 MLJ 221 where two document of titles were issued for the same land. Peh Swee Chin SCJ said at pp 229–230:

The learned trial judge, on the question of indefeasibility of title correctly relied on s 340 of the Code and *Bank Bumiputra Malaysia Bhd v Mahmud bin Haji Mohamed Din (Datin Hjh Salma bte Mohd Jamin, Intervener)* [1989] 1 MLJ 381. Alienation of the lot which was State land had taken effect upon registration of the register document of title to the first title holder in September 1968. Such indefeasibility of title can only be defeated by any of the specified statutory grounds of fraud, etc under s 340 or other grounds of equity, see for example, *Tham Kong v Oh Hiam & Ors* [1968] 1 MLJ 44. None of such statutory grounds or other grounds of equity relating to the issue of the document of title to the first title holder exists. The indefeasibility of title for the first title holder cannot be challenged.

Clearly, it follows that the document of title of the second title holder is void against that of the first title holder. On another alternatively sufficient ground, apart from indefeasibility of title, it is void also as a document of title to land, and therefore against the first title holder also, because the lot could not be alienated by the state authority, since it was no longer State land. To alienate it in these circumstances would be a wanton disregard of the express statutory provisions which provide for alienation only of State land such that it would amount to a failure to observe the mandatory statutory provisions of the Code. See *Pow Hing & Anor v Registrar of Titles, Malacca* [1981] 1 MLJ 155 (FC). *The purported alienation to the second title holder was a nullity, in our opinion, to such an extent on the facts of this case, that had there been a purchaser in good faith and for valuable consideration of the title of the second title holder, for the sake of illustration, such a purchaser would have obtained neither title nor interest of the lot, in other words, the proviso to sub-s (3) of s 340 of the Code would not apply to assist such a purchaser.* (Emphasis added.)

[41] The plaintiff summed up contending that this defect in the title at inception nullified each and every conveyance and registration in respect of the land by operation of law as provided in s 340(4) of the National Land Code .

[42] In opposing the aforesaid contention of the plaintiff on the invalid transfers of the land, the first defendant, seventh defendant, tenth defendant and 14th defendant argued that under the Torrens System of land registration, the register is everything. This position was made clear in the Federal Court case of *Teh Bee v K Maruthamuthu* [1977] 2 MLJ 7 where Ali Ag CJ (Malaya) at p 12 said:

> The importance of the register document of title in terms of s 178(3) of the Code read with section 89 is that it is conclusive evidence that title to the land in question is vested in the appellant. As the register document of title in this case was produced in court the learned magistrate was justified in holding that the appellant was prima facie the owner of the land. There is also another much more important reason why this appeal should be allowed. *Under the Torrens System the register is everything.* I need only refer to two Privy Council cases, *Creelman & Anor v Hudson Bay Insurance Company* [1920] AC 194 and *Alan Frederic Frazer v Douglas Hamilton Walker* [1967] 1 AC 569 which decided to the same effect.
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> In *Creelman & Anor v Hudson Bay Insurance Company* which was an appeal from British Columbia, Lord Buckmaster delivering the judgment of the Judicial Committee said at p 197:
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> 'Their Lordships are unable to accede to either of these propositions. In their opinion *the certificate of title* referred to in section 22 of the land Registry Act is a certificate which, *while it remains unaltered or unchallenged upon the register, is one which every purchaser is bound to accept And to enable an investigation to take place as to the right of the person to appear upon the register when he holds the certificate which is the evidence of his title, would be to defeat the very purpose and object of the statute of registration.'*
>
> In *Alan Frederic Frazer v Douglas Hamilton Walker* which was an appeal from New Zealand, Lord Wilberforce said on p 580:
>
> *It is in fact the registration and not its antecedents which vests and divests title. (Emphasis added.)*

[43] In other words, the registration of title or interest as stated in the register document of title was conclusive unless defeasible pursuant to s 340(2) of the National Land Code. This is plain from the dicta of Mokhtar Sidin JCA in the Court of Appeal case of *Ong Ban Chai & Ors v Seah Siong Mong* [1998] 3 MLJ 346 at p 372 that:

> Our opinion, although we sympathise with the predicament of the respondent, it is wholly unjust to penalise the second, third and fourth appellants for the fraud of the first appellant as well as the omission of the respondent himself to challenge by the appeal the specific findings of the learned judge and on the removal of the caveats adverted to earlier in this judgment. In this connection, we find the following passage from the judgment of Lord Diplock in the *Eng Mee Yong* case at p 214 to be helpful in our consideration of the fourth appellant in the present appeal: *The Torrens system of land registration and conveyancing, as applied in Malaya by the National Land Code 1965, has one of its principal objects to give certainty to title to land*

and registrable interests in land. Since the instant case is concerned with title to the land itself, Their Lordships will confine their remarks to this, though similar principles apply to other registrable interests. By s 340, the title of any person to land of which he is registered as proprietor is indefeasible except in case of fraud, forgery or illegality, and even in such cases a bona fide purchaser for value can safely deal with the registered proprietor and will acquire from him an indefeasible registered title. (Emphasis added.)

[44] These defendants further distinguished the cases of *Shayo (M) Sdn Bhd* and *Uptown Properties Sdn Bhd* on their facts particularly in light of the recent Court of Appeal case of *Yap Ham Seow v Fatimawati Ismail & Ors* [2014] 1 MLJ 645; [2013] 9 CLJ 577 where Raus Shariff PCA said at pp 658 & 665 (MLJ); 596 & 603 (CLJ) para 41 & 60:

Hence, we would respectfully dissent from the plaintiff's proposition that since she was the first in time and given that the issue document of title bears her name, it follows that she is the registered proprietor. In determining ownership as in the instant case the court should be concerned with how the fourth defendant got his name into the register document of title or whose interest takes priority over the other. Rather, for us the question of critical importance at the end of the day so far as the issue of ownership is concerned boils down to this: whether the interest of the fourth defendant as the registered proprietor whose name is in the register document of title is indefeasible ... We have deliberated on the relevance of the aforesaid authority and with respect we find that the case of Shayo is clearly distinguishable from the case at hand. *In our considered view the issues in Shayo centered on the title which was ultra vires the NLC. The parties who relied on this title and as a result transferred the same to the subsequent purchasers had in actual fact no title to give in the first place.* As a consequence thereof, the learned trial judge in Shayo imputed liability on the eight-12?h defendants for the faulty registration of the plaintiff's title to the wrong entity which had caused the plaintiff to lose its proprietorship to the land. *In the instant case, although a copy of the title was used to effect the transfer of the land as opposed to the original title, the hard facts of this case clearly reflects that the new title issued is indeed a title in continuation of the original title. Thus, we find that our present case is more akin to the case of Adorna Properties. The original title was indeed in the name of the plaintiff and the subsequent title in continuation was issued based on the fraudulent power of attorney executed by the forger.* By reason of the crafty scheme enacted by the fraudsters claiming the original title was lost, the end result was that there were two titles to the same land. (Emphasis added.)

[45] I also noted that Harminder Singh J has recently in *Overseas Reality Sdn Bhd v Wong Yau Choy* [2014] 3 AMR 703 also himself distinguished *Shayo (M) Sdn Bhd* on the facts and explained at p 715 that: No doubt there were two title deeds or documents of title and the computerised title was improperly issued but the significant feature in this case is that both of them bore the plaintiff's name. The title which signifies the right to the said property as well as the title deeds which are evidence of the legal ownership of the said property remained with the plaintiff. The improper issuance of the computerised IDT in the

particular circumstances of this case cannot therefore have the effect of invalidating all subsequent transactions in respect of the said property. It would be self-defeating and incongruous for the plaintiff to impeach ownership of the said property; ownership which it has not lost unlike in the case of *Shayo (M) Sdn Bhd v Nurlieda Sidek & Ors* and *Uptown Properties Sdn Bhd v Pentadbir Tanah Wilayah Persekutuan & 5 Ors* where the computerised titles were issued in the name of someone else who was a total stranger without any claim for ownership.

[46] In reconciliation of the above cases, it seems to me that the title registered and issued by the land registry would be void ab initio or at inception in rather narrow and limited factual circumstances. This occur when the land registry wrongfully registered and issued a replacement land title in the name of another person thereby depriving the original title holder's constitutional right of ownership of land. In *Tan Chiw Thoo v Tee Kim Kuay*, the land registry registered and issued a second title to the appellant who occupied the lot notwithstanding that the lot was earlier registered and title issued to the respondent. Likewise in *Shayo (M) Sdn Bhd*, the land registry during its own exercise of issuance of computerised titles mistakenly registered the land in the name of the first defendant when the original manual land title that was in the name of the plaintiff was still in his possession. The land was subsequently transacted using that computerised title. A similar situation occurred in *Uptown Properties Sdn Bhd*. Put simply, the land title would be void ab initio, if and only if, the land registry had in blatant breach of its duty under the National Land Code wrongfully registered any land in the register document of title and issued the replacement issue document of title in the name of a third party.

[47] The title would not however be void ab initio if the land registry had been duped into issuing a replacement tile in continuation in the name of the original title holder as happened in *Yap Ham Seow* where the title was issued pursuant to a crafty scheme by fraudsters claiming that the original title was lost. And in *Overseas Reality Sdn Bhd*, it did not matter so long the impugned title was issued by the land registry in the name of the original owner.

[48] Accordingly, it is now necessary to determine the validity of the title used here for the initial conveyance of the land to the first defendant. From the evidence adduced by the plaintiff, I am satisfied that IDT2 was a fake title. The issue document of title that was properly issued by the land registry in respect of the land was IDT1 which was similar in foRMand contents with the issue document of title of the adjacent Lot 506. I therefore find and hold that IDT2 was 'engineered and manufactured' by somebody outside the land registry. In other words, IDT2 was never issued by the land registry.

This finding is supported by the expert testimony of PW2. He is a *gazetted* document examiner and has 30 years of working experience in the Department of Chemistry, Malaysia including as the director of the Kuantan branch in Pahang. He is therefore in my view amply qualified to give expert opinion on handwriting as per the intents of s 45 of the Evidence Act 1950. PW2 found that the signatures of the land administrator on IDT2 was most probably of different authorship from that in IDT1 and other related land titles. Likewise the rubber stamp marks were also most probably made by a different stamp. In this regard, he undertook a systematic comparison and his detail findings and reasons were comprehensively set out in his verification report. The findings of PW2 were not seriously challenged by the defendants such as bringing another expert witness to contradict him. I accept PW2 findings which are to me very cogent and helpful.

Thus this fake IDT2 title wasn't and could not have been a title void ab initio.

Besides, there is no evidence that its counterpart register document of title was registered in the name of another person as well. At the material time, both the register document of title and IDT1 and IDT2 were registered in the name of the plaintiff. IDT2 was hence merely a forged title used for the conveyance of the land to the first defendant that attracted defeasibility pursuant to s 340(2)(b) of the National Land Code but this did not nullify any conveyance or dealing in the land.

FRAUD AND CONSPIRACY BY THE FIRST AND SECOND DEFENDANTS

[49] Since I have held that the title to the land was not void at inception, I next delve into the fraud and conspiracy that were allegedly committed by the first defendant. The burden of proof lies on the plaintiff on the higher standard of proof beyond reasonable doubt as held in many cases and recently again by the Federal Court in *CGU Insurance Bhd v Asean Security Paper Mills Sdn Bhd* [2002] 2 MLJ 1. Likewise, conspiracy to defraud demands proof to the same standard, see *Ang Hiok Seng @ Ang Yeok Seng v Yim Yut Kiu (personal representative of the estate of Chan Weng Sun, deceased)* [1997] 2 MLJ 45 and *Shell (M) Trading Sdn Bhd v Tan Bee Leh @ Tan Yue Khoen & Ors* [2013] 8 MLJ 533.

The approach has been explained by Syed Agil Barakbah SCJ in *Chu Choon Moi v Ngan Siew Tin* [1986] 1 MLJ 34 at p 38 as follows: *We agree that fraud whether made in civil or criminal proceedings must be proved beyond reasonable doubt and cannot be based on suspicion or conjecture ...* Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The degree of proof need not reach certainty but must carry a high degree of probability. What it

means is that evidence adduced is such that the court believes its existence probable in the circumstances of the particular case. If such proof extends only to a possibility, than it falls short of proving beyond a reasonable doubt. (Emphasis added.)

[50] It was submitted by the plaintiff that the first defendant either individually or jointly with the second defendant defrauded her. The plaintiff strenuously relied on the seemingly very suspicious circumstances in which the sale and purchase of agreement of the land dated 21 December 1999 was rescinded and substituted with the sale and purchase agreement dated 25 January 2000.

In support of the fraud argument, the plaintiff referred to the dicta of Vernon Ong J (as he then was) in *CIMB Bank Bhd v Abdul Rafi a/l Abdul Rajak & Ors* [2012] MLJU 804 that:

> For the purposes of vitiating title to land under s 340 NLC the fraud must be actual fraud. What is fraud? It is impossible to lay down a complete and comprehensive definition of fraud as the range of fraud is infinite. The existence of fraud is a question of fact. It is dependent upon the circumstances of each particular case ... In this context, actual fraud means dishonestly of some sort where the designed object of a transfer is to cheat a person of his existing right or whether by a deliberate or dishonest act a person is deprived of his existing right ... The fraud must be that of the registered proprietor or his privy ...

[51] As to the high standard of proof required that is equivalent to the standard in criminal cases, I observed that Varghese George Varughese JCA in the recent Court of Appeal case of *Yii Soon Ho v Public Prosecutor* [2014] MLJU 409; [2014] 1 LNS 386 held affirming the conviction of the appellant on circumstantial evidence that: The principles governing the acceptance of circumstantial evidence to convict an accuse have been laid down in numerous cases ... *The principles gleaned from those authorities was that a conviction based on circumstantial evidence was good in law if the cumulative effect of all evidence led to the irresistible conclusion that it was the accused who committed the crime.* (Emphasis added.)

It is thus my view that similarly, a defendant accused of fraud or conspiracy can be so found liable if the circumstantial evidence in totality inescapably led to this conclusion. This is particularly relevant here because the plaintiff primarily relied on the allegedly very suspicious circumstances surrounding the sale and purchase of the land between the first defendant and the second defendant on behalf of the plaintiff.

[52] Nevertheless in the Federal Court case of *Tai Lee Finance Co Sdn Bhd v*

Official Assignee & Ors [1983] 1 MLJ 81, Abdul Hamid FJ (as he then was) said at pp 83 and 85 that: ... It would seem to us that their case depended on whether there was fraud within the meaning of sub-s (2) of s 340 of the National Land Code. It was founded on the basis of constructive fraud alleging that the appellant had constructive notice of their prior interests. On the material before the court the learned judge did conclude that the appellant had constructive notice of the respondents' interest in the land. *The appellant's contention, however, is that mere constructive notice is insufficient. There must be actual fraud to defeat the person of his title or interest* ... In light of the circumstances of this case we are of the view that if the learned judge properly considered whether there was fraud to which the appellant was a party or privy and whether such fraud resulted in the registration of the chargee it is improbable that he would have come to the conclusion that the designed object of the charge was to defeat the prior beneficial interest of the respondents. *As we stated earlier, the essential question that must be determined is whether the appellant was a party or privy to any fraud the charger was guilty of. And the question is one of fact. The law is clear that the onus is upon the respondents to prove beyond any reasonable doubt that there was fraud, not constructive or equitable fraud but actual fraud. The appellant must be shown to be guilty of an act involving dishonesty–a wilful conscious disregard and violation of the right of other persons.* (Emphasis added.)

Subsequently in *M Ratnavale v S Lourdenadin* [1988] 2 MLJ 371, Hashim Yeop A Sani SCJ (as he then was) said at p 381 that: 'Suspicion, however grave, is not proof for the purpose of proceeding under the said provision (s 340(2)(a)) of the National Land Code'.

[53] The first defendant retorted that the land was a bona fide purchase for valuable consideration from the second defendant. It was explained by DW1 and DW2, both directors of the first defendant that they had in 1999 as nominees of the first defendant each individually purchased the land and the neighbouring contiguous Lot 506 from the second defendant and a Lim Ng Huwa respectively. It was represented to them that both pieces of land were planted with palm oil trees of three to four years and almost ready for harvesting. The agreed purchase price for the land and Lot 506 was RM817,973.50 and RM675,000 respectively. They later discovered through rumours that they had sighted two different pieces of land prior to the execution of the sale and purchase agreements. In fact this land and Lot 506 were low lying *belukar* covered swampy land adjacent to a river.

[54] In the result, both DW1 and DW2 wanted to rescind the sale and purchase agreements and refund of the deposits paid. Following further negotiations between Lim Ng Huwa and the second defendant and them, it was finally agreed that the first defendant would instead purchase both the land

and Lot 506 to be used as a jetty cum warehouse at the discounted price of RM350,000 and RM280,000 respectively. According to DW1 and DW2, the first defendant was procured in 1997 to be their holding company for property investment. In addition, it was agreed that the earlier deposits paid were treated as part payment towards this new purchase. Accordingly, the earlier sale and purchase agreements dated 21 December 1999 were revoked and substituted with the sale and purchase agreements dated 25 January 2000. The sale of Lot 506 did not eventually go through by reason of the death of the original co-owner and the demise affected the transfer. As for the land, the sale went through and the land was duly registered in the name of the first defendant on 15 March 2000 after three instalment payments of RM81,093.75, RM162,187.50 and RM106,718.75 were made on 15 December 1999, 27 January 2000 and 31 March 2000 respectively. The purchase and conveyance of the land was handled for the first defendant by its solicitors, Messrs KC Yap & Partners who also advised DW1 and DW2 on the acceptability of purchasing from an agent empowered through a power of attorney.

[55] I have no reason to doubt the explanations of DW1 and DW2 as they were plausible and consistent with the documentary evidence produced before me. In my view, their conduct in relation to the initial purchase of both lands by them individually was rash. They bought the lands as investment in oil palm plantation and entered into the sale and purchase agreements near a million Ringgit in value each without having prior ascertained the exact location of the lands purchased. They paid the deposits before even executing the sale and purchase agreements.

After rescinding the original sale and purchase agreements, the subsequent re-purchase of the lands by the first defendant was for a different purpose to house a jetty cum warehouse. It seems to me the re[ac]purchase was more to overcome the problem of seeking the refund of the deposit from Lim Ng Huwa and the second defendant through civil litigation for their earlier purchase. Nevertheless since they were the directors of the first defendant, they were entitled to cause the company to re-purchase the lands as they thought fit. There was no professional advice sought as to whether the lands were bought at market prices.

[56] The circumstances as revealed here may not have been the ordinary conduct of most businessmen who exercised commercial prudence. Both DW1 and DW2 were probably reckless by having acted merely on acumen and instinct. However, this per se is in my opinion insufficient and not compelling enough circumstantially for me to impute actual fraud or conspiracy on the part of the first defendant to cheat the plaintiff. From the evidence adduced, it could not also be plainly seen beyond reasonable doubt that the first and the second defendant had colluded or acted in concert to defraud the plaintiff.

[57] As for the second defendant, he did not even enter an appearance after the writ was served upon him by the plaintiff. Obviously he was disinterested to defend the suit. He was absent at the trial. In fact he had falsely created a sale and purchase agreement of the land between him and the plaintiff dated 5 June 1996 but did not proceed further to register the land in his name. I am convinced by the testimony of PW3 and PW2 that the signature in the purported power of attorney dated 8 January 1997 executed by the plaintiff was forged. In this regard PW2 cogently explained that the signature in the power of attorney was most probably from a different author because:

(a) the three Chinese characters in the plaintiff's purported signature were noticeably and consistently written smaller in size;

(b) the three Chinese characters were written slanted upwards from left to right but not horizontally aligned;

(c) the three Chinese characters possessed written strokes that were more connected than separated;

(d) the base of the left component of the first Chinese character of the signature was roundish instead of an angular loop;

(e) the left component of the first Chinese character was of a different letter design and structural formation; and

(f) the other two Chinese characters were of a totally different letter design and structural formation.

The purported signature therefore differed from the signatures in the controlled samples of the plaintiff's actual signature provided to him by the plaintiff. The detail findings and reasons of PW2 were comprehensively set out in his verification report.

I further find and hold that the forgery was caused by the second defendant to defraud the plaintiff as they were no other reasonable explanation to the contrary from the evidence adduced. In addition, the second defendant had acted fraudulently to benefit himself by signing the sale and purchase agreement with the first defendant dated 25 January 2000 and the memorandum of transfer (Form 14A) of the land dated 25 January 2000 without the knowledge and authorisation of the plaintiff. I also find and hold as a matter of fact by inference that the fake IDT2 was 'engineered and manufactured' by the second defendant and this IDT2 was utilised to transfer the land to the first defendant.

[58] In the circumstances and besides the fake IDT2, the sale and purchase agreement of the land dated 5 June 1996 between the plaintiff and the second defendant, sale and purchase agreement between the first defendant and the

plaintiff dated 25 January 2000 and the memorandum of transfer of the land dated 25 January 2000 were tainted and I find and hold that they could not validly be used to convey the land.

[59] It follows that the transfer of the land and registration of the title in the name of the first defendant was also defeasible as provided by s 340(2)(b) of the National Land Code because the registration was obtained by forgery and/or through insufficient or void instruments and I so find and hold accordingly.

[60] The first defendant however contended that the land was purchased bona fide for valuable consideration. Consequently the registration of the land in its name remained protected by the proviso in s 340(3) of the National Land Code.

[61] I find and hold that the first defendant's contention was misconceived and unsustainable following the Federal Court case of *Tan Ying Hong v Tan Sian San & Ors* [2010] 2 MLJ 1; [2010] 2 CLJ 269 which overruled *Adorna Properties Sdn Bhd v Boonsom Boonyanit* [2001] 1 MLJ 241; [2001] 2 CLJ 133, (FC). In this regard, the first defendant here did not enjoy indefeasibility of its registered title by virtue of the proviso notwithstanding that it might have been the bona fide purchaser of the land with valuable consideration. In *Tan Ying Hong*, Arifin Zakaria CJ Malaya (as he then was) succinctly held at pp 20 (MLJ); p 294 (CLJ) para 52 and 53 that:

> *Furthermore, eventhough sub-s (3)(a) and (b) refer to the circumstances specified in sub-s (2), they are restricted to subsequent transfer or interest in the land subsequently granted thereout. So it could not apply to the immediate transferee of any title or interest in land.* Therefore, a person or body in the position of Adorna Properties could not take advantage of the proviso in sub-s (3) to avoid its title or interest from being impeached. It is our view that the proviso which expressly stated to be applicable to sub-s (3) ought not to be extended as done by the court in Adorna Properties, to apply to sub-s (2)(b) ... For the above reasons, with respect, we hold that the Federal Court in Adorna Properties had misconstrued s 340(1), (2) and (3) of the NLC and came to the erroneous conclusion that the proviso appearing in sub-s (3) equally applies to sub-s (2). By so doing, the Federal Court gave recognition to the concept of immediate indefeasibility under the NLC which we think is contrary to the provision in s 340 of the NLC. (Emphasis added.)

[62] In the premises, it is unnecessary for me to consider here whether the first defendant was the bona fide purchaser for valuable consideration as this protection accorded by the proviso would be only relevant to the subsequent registered transferees and chargees such as the seventh, tenth and 14th defendants. At this juncture, the registration of land in the name of the first defendant was bad in law.

[63] The final connected issue that concerns the first defendant is its striking out application dated 8 November 2012 that was fixed for hearing on 3 March 2014, the originally scheduled first day of the trial. To avoid derailing the trial, I then directed that the application be taken together with the other trial issues and considered at the end. The striking out application was framed pursuant to O 18 r 19 of the Rules of Court 2012 primarily on the ground of limitation pursuant to s 6 of the Limitation Act 1953, to wit:

> 6. Limitation of actions of contract and tort and certain other actions
>
> 1) Save as hereinafter provided the following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say–
>
> (a) actions founded on a contract or on tort;
>
> (b) actions to enforce a recognisance;
>
> (c) actions to enforce an award;
>
> (d) actions to recover any sum recoverable by virtue of any written law other than a penalty or forfeiture or of a sum by way of penalty or forfeiture.
>
> (2) An action for an account shall not be brought in respect of any matter which arose more than six years before the commencement of the action.

[64] In retort, the plaintiff contended that the applicable provision was instead ss 9 and 29 of the Limitation Act 1953:

> 9. Limitation of actions to recover land
>
> (1) No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him, or if accrued to some person through who he claims, to that person.
>
> 29. Postponement of limitation periods in case of fraud or mistake
>
> Where, in the case of any action for which a period of limitation is prescribed by this Act, either–
>
> (a) the action is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent; or
>
> (b) the right of action is concealed by the fraud of any such person as aforesaid; or
>
> (c) the action is for relief from the consequences of a mistake,
>
> the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it:
>
> Provided that nothing in this section shall enable any action to be brought to recover, or enforce any charge against, or set aside any transaction affecting, any property which–

(i) in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed; or

(ii) in the case of mistake, has been purchased for valuable consideration, subsequently to the transaction in which the mistake was made, by a person who did not know or have reason to believe that the mistake had been made.

and the cases of *Tenaga Nasional Berhad v Kesang Trading Sdn Bhd* [2002] 6 MLJ 1; [2002] 7 CLJ 200, *Govindasamy s/o Muthulingam v Ooi Kee Chye & Anor* [2012] 7 MLJ 254; [2012] 1 CLJ 875 and *Phua Lee Hui lwn Kee Po King dan satu lagi* [2011] MLJU 1143; [2012] 2 CLJ 941.

[65] This suit was filed on 19 April 2005 and the earliest date the problem allegedly occurred could be taken as from the creation of the power of attorney on 8 January 1997 for purposes of recovery of the land. As for fraud, the plaintiff only discovered it in early 2003. In the circumstances, limitation had certainly not set in by the time this suit was commenced. The striking out application is therefore disallowed.

Bona fide purchase by the seventh defendant

[66] Since I have found that the registration in the name of the first defendant was bad, I have now to determine whether the subsequent registration in the name of the seventh defendant was valid. In this regard, it is plain that this is solely dependent upon whether the seventh defendant enjoyed the protection of the proviso in s 340(3) of the National Land Code as bona fide purchaser for valuable consideration.

[67] The plaintiff asserted that the first defendant and the seventh defendant shared the same company secretary. In addition, one of the directors of the first defendant, to wit: DW2, the sixth defendant, was related to a director of the seventh defendant. The relationship was explained by DW2 as daughter of cousin brother which is fairly distant to me. Since the plaintiff had abandoned her charge of fraud and conspiracy against the seventh defendant, the fact that they shared the same company secretary as well as the existence of a relationship between their directors is of considerably lesser significance, if not irrelevant. Prima facie, the sale of the land by the first defendant to the seventh defendant took place only in 2007 (seven years after the first defendant purchased the land and two years after the dispute on the private caveat entered by the plaintiff was removed by the court) is in my view suggestive that there was unlikely fraud or conspiracy on the part of the seventh defendant to defraud the plaintiff.

[68] The meaning of bona fide purchaser or commonly known as the good faith purchaser had been considered by the Court of Appeal in *State Tailor Sdn Bhd v Nallapan* [2005] 2 MLJ 589. In that case, Richard Malanjum JCA (as he then was) said at p 603 para 44:

> The term 'bona fide purchaser' has been used in a host of cases. *Simply put it means a buyer in good faith. And the basis element of good faith is the absence of fraud, deceit or dishonesty and the knowledge or means of knowledge of such at the time of entry of the transaction. But the overriding consideration is the 'Particular circumstance of each case'* ... (Emphasis added.)

[69] Moreover in another Court of Appeal case of *Au Meng Nam v Ung Yak Chew & Ors* [2007] 5 MLJ 136; [2007] 4 CLJ 526, Raus Shariff JCA (as he then was) said at pp 156 (MLJ); 554 (CLJ) para 42 to 44:

> Had the learned trial judge taken the above facts and circumstances into consideration, he cannot possibly conclude that the 1st defendant was a bona fide purchaser for valuable consideration, so as to be protected under s 340(3) of the Code. To me, the first defendant had acted hastily. He concluded the sale without any proper investigation into the title or the persons claiming to be proprietors. No doubt he had every right to take advantage of the low price that was offered to him but he took the risk. When he embarked into such risk, it cannot be at the expense of the plaintiffs. This is because while he had a choice, the plaintiffs had none. In fact, the plaintiffs were helpless. The plaintiffs could not do anything to prevent the fraud. Even locking the title in a safe would not had help the plaintiffs. In such circumstances the court must not favour the first defendant, over the plaintiffs. To do so, would be doing injustice to the plaintiffs.
>
> Further, had the evidence adduced in this case been properly considered and assessed by the learned trial judge, a reasonable inference would be that the first defendant knew at the time he bought the said land, the purchase price was below the market value. But he wanted to take advantage of the low price. He did a fast track to complete the purchase. In doing so he disregarded his obligations to investigate the alleged proprietors and the genuineness of the documents. My respectful view is that a purchaser in good faith does not include a purchaser who is careless or who had been negligent. In *Oliver v Hinton* [1899] Chancery Division 264 Lindley MR said:
>
> *To allow a purchaser who acts with such gross carelessness to deprive a prior innocent mortgage of her priority would be the greatest injustice.*
>
> *So too here. The 1st defendant is under the obligation to investigate properly all matters relating to the sale of the said land and not to just blindly accept what was claimed by the 'vendors' as correct and genuine. When he failed to take the ordinary precautions which ought to be taken in such a matter he is not entitled to the protection of the court.* (Emphasis added.)

[70] In other words, the good faith purchaser would be required to have undertaken the ordinary precautions including properly investigating into

matters relating to the land sale and not be reckless in the making of the purchase of the land.

[71] With regard to the seventh defendant, DW3 testified that DW2 whom DW3 had business dealings in 2007 informed DW3 that the first defendant offered the land for sale. DW3 besides being a director of the seventh defendant was also involved as a sole proprietor Lee Bok Chooi Trading in the business of trading in building materials. According to him, the purchase of the land for use as a jetty by the seventh defendant would be a viable transportation business, amongst others for loading/unloading of timber to Lee Bok Chooi Trading who imported 500 tonnes monthly for sale to its customers.

[72] Consequently, the seventh defendant entered into the sale and purchase agreement of the land with the first defendant dated 24 December 2007 at the purchase price of RM900,000. The conveyancing transaction of the land was undertaken by Messrs.

Thashin SL Wong, the solicitors of the seventh defendant. As testified by DW4 the senior partner in Messrs Thashin SL Wong, the transaction went through after all the necessary documentation and procedures were complied. Furthermore the ordinary precautions were taken such as land searches. The title to the land was registered in the name of the seventh defendant on 26 March 2008 as evidenced by IDT3 after the seventh defendant paid the purchase price.

[73] From the surrounding circumstances and evidence adduced, I am satisfied that the seventh defendant had no knowledge of the fraud committed by the second defendant in respect of the land. There was also nothing suspicious to me in the conduct of the sale transaction between the first defendant and the seventh defendant. The explanations of DW3 and DW4 were consistent and supported by the documentary evidence produced. The transaction was a genuine commercial sale of land. I am therefore satisfied that the seventh defendant was the bona fide purchaser of the land for valuable consideration and I so find and hold accordingly.

[74] I am mindful that the seventh defendant did not call a valuer to opine on the market value of the land at the time of purchase in 2007. However, the seventh defendant had demonstrated that the valuation by the government valuer of the RM21,000 ad valorem stamp duty payable under the Stamp Act 1949 on transfer of the land commensurate with RM900,000 being the then prevailing fair market price. The seventh defendant also quoted the following cogent passage of Lee Swee Seng J in *Yew Foo Chun v Wong Nye Keong & Ors* [2014] 1 LNS 189:

> The fact they bought it at a good price should not be held against them on that score alone in absence of other suspicious circumstances. What is suspicious must be judged through the eyes of a layman like them who might have little understanding as to how a transaction is structured but who thought that going through a fiRMof solicitors would be all especially when relevant searches on the said Land had been done. Otherwise nobody can ever buy at a bargain for fear that they might have been unwittingly a party to a fraud.

which I am wholly in agreement.

[75] Hence and notwithstanding that the registration of the title in the name of the first defendant was bad in law as found in para 62 above, the subsequent registration of the title in the name of the seventh defendant was nonetheless indefeasible because the seventh defendant was the bona fide purchaser for valuable consideration. In other words, the land was properly and validly registered in the name of the seventh defendant. In such circumstances, it would no longer be possible for the title of the land to revert and re-vest in the plaintiff even if the respective title and interest of the tenth and 14th defendants are defeated. The seventh defendant would become the registered proprietor in that instance.

[76] The seventh defendant had also applied to strike out the claim of the plaintiff under O 18 r 19 of the Rules of Court 2012 but by reason of limitation. As with the case of the first defendant, that application had been deferred to be heard together with the other issues after the trial. According to the seventh defendant, the plaintiff only included the seventh defendant as a party to this action on 3 October 2012, 16 years and seven months after the land was transferred to the first defendant on 15 March 2000. The plaintiff was therefore out of time pursuant to s 6 of the Limitation Act 1953.

[77] It was contended in rebuttal by the plaintiff that the applicable provision here was s 9 of the Limitation Act. In addition, the plaintiff relied on the doctrine of relation back as explained in the following dicta of Abdul Malik Ishak JCA in the Court of Appeal case of *Sanmaru Overseas Marketing Sdn Bhd v PT Indofood International Corp & 2 Others* [2009] 2 MLJ 765 at p 804; [2009] 2 AMR 309 at p 342:

> [43] In regard to limitation, I have this to say. The wide and broad powers of the court pursuant to O 20 r 5 of the RHC read together with O 15 r 6 of the RHC would include the power to give leave to add a party or to amend any pleading even after the expiry of any relevant period of limitation (O 20 r 5(2) of the RHC) or to add a new cause of action (O 20 r 5(5) of the RHC). And by virtue of the doctrine of relation back, the law treats the 'new' party (here, it would be the third plaintiff) as being a party who had been a party from the date of the issue of the writ and that

would be on October 13, 1993 and that would be well within any period of limitation.

[44] The law may be stated as follows. That an amendment will be granted, where the limitation period has expired, notwithstanding that such an amendment will add or substitute a new cause of action provided that the new cause of action has arisen from the same or substantially the same set of facts (*Hock Hua Bank Bhd v Leong Yew Chin* [1987] 1 MLJ 230, (SC)). Thus, the court may allow the amendments mentioned in Order 20 r 5(3), Order 20 r 5(4) and Order 20 r 5(5) of the RHC, notwithstanding that the application for an amendment is made after the expiry of any relevant period of limitation current at the date of the issue of the writ. And the best part is this. *That the application may be made, even though at the date of the application, the cause of action to which the amendment is related may have become time-barred but would not have been if it had been made at the commencement of the action. And this is simply because an amendment takes effect not at the date the application for the amendment is made but at the date of the commencement of the action. This is known as the doctrine of relation back and it has been applied in many instances* (*Boss s/o Ramasamy v Penang Port Sdn Bhd & Anor* [1996] 5 MLJ 511). (Emphasis added.)

[78] I accept the plaintiff's argument here. The limitation period to recover the land was 12 years from the accrual of the cause of action on 15 March 2000 when the land was registered in the name of the first defendant. By virtue of the doctrine of relation back, the seventh defendant was deemed made a party on 19 April 2005 when this suit was filed notwithstanding that joinder only took place on 3 October 2012. Consequently, the plaintiffs claim to defeat the seventh defendant's title to recover the land was well within the limitation period. The striking out application is therefore dismissed.

Bona fide purchase and charge by the tenth defendant and fourteenth defendant respectively

[79] It is common ground that the land is presently registered in the name of the tenth defendant subject to the charge registered in the name of the 14th defendant. This is evidenced by IDT4.

[80] Both the tenth and 14th defendants also contended that they were bona fide purchaser and chargee of the land for valuable consideration claiming through or under the seventh defendant.

[81] In this regard, DW5 testified that the tenth defendant was established to manage business operations in Klang in joint venture with a company from China. The tenth defendant accordingly obtained from the governmental authorities the necessary information and advice to set up a factory in an area designated for heavy industry. The tenth defendant thereafter searched for a suitable factory site and came to know of the land that was advertised for sale by

the seventh defendant through a real estate negotiator, DW6. The land was found to be suitable and negotiations took place between the seventh defendant and the tenth defendant through DW6. The sale was concluded by the execution of a sale and purchase agreement between them on 20 July 2011 at the purchase price of RM3,104,273.

[82] For financing of the purchase of the land, the tenth defendant applied for a loan from the 14th defendant. As testified by DW8, as soon as the tenth defendant applied for the loan, the 14th defendant conducted credit checks on the tenth defendant. The loan facilities were offered on 11 October 2011 to the tenth defendant after due processing was carried out and credit worthiness approved by the 14th defendant. The loan was a fixed loan facility of RM1m and an overdraft facility of RM500,000.

[83] According to DW8, the 14th defendant required a property valuation to be undertaken and KGV International Property Consultants (M) Sdn Bhd was appointed to undertake the valuation of the land. The prevailing fair market value of the land as testified by DW7 was RM3,105,000. This valuation was even higher than the estimate made by PW4, the valuer engaged by the plaintiff. The seventh defendant was paid by the tenth defendant for the land as part financed by the 14th defendant after the necessary sale and purchase agreement, memorandum of transfer and security documentation were executed.

[84] The tenth and 14th defendant had also engaged their solicitors Messrs Liew Khong & Co to undertake the conveyance of the land and entry of the charge after all necessary procedures including land searches were done.

[85] The land was thereafter registered in the name of the tenth defendant with a charge concurrently registered in the name of the 14th defendant on 19 December 2011.

[86] I have no reason to disbelieve the testimonies of DW5 to DW8 which were consistent with the documentary evidence adduced. The dealing of the land involving the seventh defendant and the tenth and 14th defendants was to me another ordinary and arms length commercial transaction and financing of land. Furthermore, I am satisfied that they had no knowledge whatsoever of the fraud committed by the second defendant in respect of the land. In *OCBC Bank (M) Bhd v Lee Lee Fah & Ors and Another Appeal* [2000] 1 MLJ 134, Shaik Daud JCA held at p 141 that:

> As for the bank, they are innocent party and they are therefore protected by s 340(1) of the National Land Code 1965. Their interest as chargee is indefeasible unless there are evidence to their knowledge that there was fraud or misrepresentation or

A where the registration of the charge was obtained by forgery or where the title or interest was unlawfully acquired.

A similar result was reached in *Bumiputra-Commerce Bank Bhd v Augusto Pompeo Romei & Anor* [2014] 3 MLJ 672; [2014] 6 CLJ 27.

[87] Hence I find and hold that the tenth and fourth defendants were bona fide purchaser and chargee respectively for valuable consideration. It follows that their respective registrations were and remain valid and indefeasible as provided in s 340(1) and proviso to s 340(3) of the National Land Code.

[88] Likewise, the tenth defendant had on 14 November 2012 applied to strike out the plaintiff's action pursuant to O 18 r 19 of the Rules of Court 2012 on the ground of limitation, acquiescence and laches by reason that the tenth defendant was only joined in 2012 as a party to the action. The hearing of the application was similarly deferred to be heard together with the other trial issues as well. As for limitation, I reiterate my views and findings in paras 76–78 hereinabove in respect of the seventh defendant which apply here to the tenth defendant too.

[89] In respect of acquiescence and laches, the tenth defendant cited s 32 of the Limitation Act 1953 which provided:

> Nothing in this Act shall affect any equitable jurisdiction to refuse relief on the ground of acquiescence, laches or otherwise.

The tenth defendant argued that acquiescence set in when a person stood by while the violation of his rights was in progress and the person must in consequence be debarred from complaining subsequently about such a violation. Acquiescence may be a defence to the claim even though the period as prescribed by the Limitation Act 1953 had not expired: see *Tan Ah Chim & Sons Sdn Bhd v Ooi Bee Tat & Anor* [1993] 3 ML J 633.

[90] To illustrate acquiescence and laches, the tenth defendant contended that the plaintiff had known the private caveat lodged by her in 2003 to protect her claim to the land had been removed in May 2005. The plaintiff thereafter failed to take any reasonable step to continue to protect her claim such as a stay of the removal order, an ad interim injunction, etc. If so, the tenth defendant would have been forewarned from its official search done on the land and refrained from purchasing the land from the seventh defendant.

[91] The plaintiff through PW1 in response stated that the plaintiff had entrusted the whole matter in the hands of her then solicitors Messrs Ling & Theng Bok. After having realised later that the matter had gone amiss, the

plaintiff then in 2012 sued Messrs Ling & Theng Bok in Shah Alam High Court Suit No 22-NCVC-104–10 of 2012 besides adding many other defendants including the tenth defendant here into this action.

[92] In *M Ratnavale*, Hashim Yeop Sani SCJ said at p 178 on laches:

> The doctrine of laches in the court of equity is not an arbitrary or a technical doctrine. The discretion is founded on the principle that there may be circumstances when it would be practically unjust to give a remedy of specific performance, for example either because the party has by his conduct done that which might fairly be regarded as a waiver or where by his conduct he has put the other party in a situation in which it would be unreasonable to place him if the remedy were afterwards to be asserted. In *Lindsay Petroleum Co v Hurd* [1874] LR 5 PC 221 the doctrine was stated by Lord Selborne and he said:
>
> But in every case if an argument against relief which otherwise would be just is founded on mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable.
>
> Two circumstances always important in such cases are the length of the delay, and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy.
>
> This statement was approved by Lord Blackburn in *Emile Erlanger & Ors v New Sombrero Phosphate Co & Ors* (1878) 3 App Cas 1218 at p 1279.

Moreover in *Tan Kok Chuan & Anor v Liew Nam Foong* [2000] MLJU 76; [2000] 5 CLJ 533, Abdul Malik Ishak J (as he then was) said at p 556:

> The doctrine of laches has developed over the years. The court will be reluctant to grant relief to stale claims: *vigilantibus et non dormientibus lex succurrit. The party who has been dilatory in the prosecution of his claim and has acquiesced in the wrong done to him is said to be guilty of laches and is accordingly barred from obtaining relief although his claim may not be curtailed by the statute of limitation. It pays to be diligent and it also pays to prosecute one's claim with promptitude.*(Emphasis added.)

[93] From the circumstances as revealed, it is my view that the plaintiff was indolent, probably misadvised by her solicitors after her private caveat was removed by the first defendant in 2005. She was not proactive to protect her own interest. Had the necessary protective measures been taken, those might have avoided the subsequent transfer of the land to the seventh defendant and later to the tenth defendant. Though limitation had not expired as far as the tenth defendant is concerned by reason of the doctrine of relation back, I nevertheless find and hold that the plaintiff was disentitled to pursue her claim against the tenth defendant because of laches and acquiescence. It was inequitable for the plaintiff to reclaim her title from the tenth defendant after

the plaintiff had by her inaction permitted the tenth defendant to purchase the land unrestrained.

[94] Consequently and besides finding that the tenth defendant was the bona fide purchaser of the land for valuable consideration, I would also have struck off the plaintiff's action against the tenth defendant for laches and acquiescence. The tenth defendant had however at clarification agreed that the striking out application be merged and taken together with the trial issues, so I will not make a separate order of striking out.

Fraud and conspiracy by the fifteenth defendant

[95] The contention of the plaintiff here was that the 15th defendant defrauded the plaintiff in conspiracy with the second defendant. This was because the 15th defendant attested to the plaintiff's signature in the power of attorney on 8 January 1997 in her absence as testified by DW 3 herself and corroborated by the opinion of the hand writing expert witness, DW2 that the signature in the power of attorney was forged.

[96] In defence, the 15th defendant primarily put the plaintiff to strict proof. In addition, he contended that the power of attorney was duly attested in accordance with s 3 of the Powers of Attorney Act 1949 and r 13 of the Commissioners for Oaths Rules 1993. The power of attorney was also subsequently duly registered by the Shah Alam High Court on 6 December 1999. Section 3(2) of the Powers of Attorney Act 1949 read:

> Notwithstanding anything to the contrary contained in any written law in force at the commencement of this Act, an instrument purporting to create a power of attorney duly executed and authenticated in accordance with this section shall be deemed to be properly and validly executed and attested for all or any purposes for which a power of attorney may be used under any such written law.

and rr 13 and 14 of the Commissioners for Oaths Rules 1993 on Conduct and Duties of Commissioners for Oaths provide:

> 13(1) In the course of performing his duties, a Commissioner for Oaths shall pin at the top left shirt pocket an identification tag described in Form 5.
>
> (2) In exercising his functions, a Commissioner for Oaths shall personally attend to any person requiring his services and shall–
>
> (a) verify the identity, the personal particulars as given in the identity card or passport, and the address of the person making the declaration, affirmation, affidavit, oath, or statement before the Commissioner;
>
> (b) read over and explain the contents of the documents and the exhibits attached thereto to the deponent or the maker of the document, if the

deponent or maker of the document is blind, illiterate or does not understand the language written in the document, before certifying that he has done so in the jurat;

(c) initial any alteration made in the document to be sworn or affirmed;

(d) not affix his seal to any document unless the deponent or the maker of the document signs or affixes his thumbprint thereto before him;

(e) refuses the services of his office when the Commissioner has cause to suspect that any person before him is engaging in deception, fraud, duress, or any other illegal conduct;

(f) carry out the functions of his office in a prompt, reasonable and business-like manner; and

(g) make himself available to conduct all functions of his office at regulair and reasonable hours.

14(1) A Commissioner for Oaths shall maintain a register in which shall be recorded the particulars of the services that he has rendered including all affirmations, declarations, acknowledgements, affidavits and other instruments upon which the Commissioner has placed his seal. The register shall be in Form7.

The register shall be kept at the place of business of the Commissioner for Oaths during his business hours.

A Commissioner for Oaths shall submit the register to the Lord President on or before the 1st day of February of each year and shall make it available to the Lord President at any time upon his request.

[97] The 15th defendant also submitted the mere fact that he attested to the power of attorney was not proof of breach of his duty relying on the dicta of Abdul Malik Ishak J (as he then was) in *Citibank N.A. v Mrs N. D. Chandrasegaran Nee Nirmala Devi a/p P Ratnadurai* [2007] 8 MLJ 149 at p 160:

His Lordship Anuar J heard the defendant's application on 5 October 1993. And at the hearing, the plaintiff brought up the issue that the power of attorney given by the defendant to her attorney was fraudulent. His Lordship then made a ruling and relied on s 3(2) of the Powers of Attorney Act 1949 read together with s 85 of the Evidence Act 1950 and drew a statutory presumption in favour of a power of attorney and held that the power of attorney was valid ... s 85 of the Evidence Act 1950 reads as follows:

85. Presumption as to powers of attorney

The court shall presume that every document purporting to be a power of attorney, and to have been executed before and authenticated by a Notary Public or Commissioner for Oaths, or any court, Judge, magistrate, or consular officer of Malaysia was so executed and authenticated.

[98] The burden of proof of fraud or conspiracy beyond reasonable doubt here undoubtedly lies with the plaintiff. The evidence relied on by the plaintiff was again circumstantial. The plaintiff accused the 15th defendant of participating in the forgery of the plaintiff's signature particularly because the plaintiff herself did not sign the power of attorney before him. In para 57 hereinabove, I have found and held that the plaintiff's signature was forged. In other words, it was not signed by the plaintiff albeit supposedly so attested to by the 15th defendant. The provisions in s 3(2) of the Powers of Attorney Act 1949 read with s 85 of the Evidence Act 1950 which are to my mind akin to the application of *Turquand*'s rule in company transactions are simply not relevant. This is because the issue here is not about third parties that relied on the power of attorney but on the liability of a commissioner for oaths who wrongly authenticated that power of attorney.

[99] In my view, my finding of forgery per se does not necessarily mean that the 15th defendant had acted fraudulently or in conspiracy with the second defendant to cheat the plaintiff. It was possible that an imposter arranged by the second defendant could have signed before him claiming to be the plaintiff. It could equally be possible that he authenticated on the power of attorney that was pre-signed without meeting the person. The 15th defendant's register under r 14(1) of the Commissioners for Oaths Rules now kept in the registry of the Federal Court may shed some light but that register was not produced by the plaintiff. Although DW12, the 15th defendant himself was present in court, he was not able to explain on what happened by answering questions posed to him by the plaintiff due to his medical condition. He is confirmed to be suffering from Alzheimer's disease cum dementia by DW10, the doctor who treated him. In this respect, it would also be inappropriate for me to make any adverse inference against him pursuant to s 114(g) of the Evidence Act 1950.

[100] The 15th defendant would be exonerated if he was conned by an imposter. He would however be negligent and even criminally prosecuted under s 199 of the Penal Code if he had authenticated the power of attorney pre-signed. Nevertheless, the plaintiff's pleaded case against the 15th defendant was not that of negligence. In the circumstances, I find and hold that the available evidence before me as adduced by the plaintiff is inadequate to surmount the burden of proving the plaintiff's pleaded case of fraud or conspiracy on the part of the 15th defendant in cahoots with the second defendant beyond a reasonable doubt. I echo the views of Mohd Ghazali J (as he then was) in *Dato Toh Kian Chuan v Swee Construction and Transport Company (Malaya) Sdn Bhd* [1996] 1 MLJ 730 at p 756 on fraud:

> I find that the petitioner has failed to forward any sufficient particulars of fraud or if there were any, there was general vagueness in the evidence relating to fraud which actually took place.

and the views of Zaleha Yusof JC (as she then was) in *Tiarasetia Sdn Bhd v Yayasan Selangor & Anor* [2009] MLJU 1602 on conspiracy:

> ... the plaintiff must prove that the 1st and 2nd defendants combined and did an unlawful act to cause loss to the plaintiff. There is no evidence of any unlawful act.

[101] The 15th defendant had also on 21 December 2012 applied to strike out the action on the grounds of limitation, laches and acquiescence but the application was similarly deferred to be heard with the other issues at the trial. The plank of the 15th defendant's argument was that he was also only brought in as a party in 2012.

[102] For the same reason because of relation back just as in respect of the seventh defendant and Tenth defendant as well as s 29 of the Limitation Act 1953 that postponed accrual of the cause of action until fraud had been reasonably discovered, I find and hold that limitation had not set in against the 15th defendant. As for laches and acquiescence, unlike the tenth defendant, I am not convinced that the inaction of the plaintiff in the circumstances in paras 90–91 hereinabove had materially affected the 15th defendant. Accordingly the striking out application of the 15th defendant is disallowed.

Negligence of the 16th and 19th defendants

[103] The plaintiff had during clarification also abandoned her claim against the 16th and 19th defendants for fraud and conspiracy. Thus her claim against them is limited to negligence.

[104] In this regard, the plaintiff generally cited the case of *Jaswant Singh v Central Electricity Board and Anor* [1967] 1 MLJ 272 that approved the dicta of Alderson B that:

> Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.

and submitted that the 16th defendant or the 19th defendant or both as the governmental body in charge of land matters in Selangor owed a duty of care to the plaintiff to ensure that the interest of the plaintiff as registered in the issue document of title was preserved. The plaintiff did not however submit case authorities in point on similar facts.

[105] As to the breach of the duty, the plaintiff firstly submitted that both the defendants did not adhere to the provisions of the 14th Schedule of the National Land Code 1965 by allowing the situation where a manual and computerised issue document of titles of the land to be in existence. This was

because the 19th defendant had on 28 April 2004 given the manual issue document of title to the first defendant's solicitors but yet on 27 December 2004 wrote to the plaintiff's solicitors that the computerised issue document of title of the land in the name of the first defendant was still with the 19th defendant. DW11 had seemingly admitted at trial that it was an oversight on the part of the 19th defendant.

Secondly, the 19th defendant wrongly issued the fake title IDT2 and did not deploy any personnel to check and authenticate the validity of the land titles that were presented for registration and thereby allowed the fake title IDT2 to be used for transfer of the land.

The plaintiff thirdly submitted that the 19th defendant ought not to have registered the transfer of the land from the plaintiff to the first defendant by virtue of the private caveat seen endorsed in IDT2.

Fourthly, it was contended that the 19th defendant failed to enter a registrar's caveat to protect the plaintiffs interest in the land.

[106] In consequence the plaintiff submitted that she suffered loss and damage by having lost the ownership to the land.

[107] The defence put up by the 16th defendant and 19th defendant were both procedural and substantive. The procedural ones were earlier raised in their striking out application that was also deferred to be dealt after the trial. The procedural defences involved failure by the plaintiff to include the appropriate parties in this suit in contravention of ss 5 and 6 of the Government Proceedings Act 1956 and limitation pursuant to the Public Authorities Protection Act 1948.

As for the substantive defence, it was contended that the 16th defendant was wrongly joined because the land was not under the purview and supervision of the 16th defendant. Furthermore, both the defendants denied the plaintiffs allegations and put the plaintiff to strict proof. In gist, the 19th defendant stated that the land dealings were properly administered at all material times subject to the provisions and limitations provided in the National Land Code 1965. In any event, both the defendants were protected by s 22 of the National Land Code which read:

> No officer appointed under this Part shall be liable to be sued in any civil court for any act or matter done, or ordered to be done or omitted to be done, by him in good faith and in the intended exercise of any power, or performance of any duty, conferred or imposed on him by or under this Act.

[108] I will first touch on the twofold procedural defences raised by the 16th and 19th defendants. As to the non-compliance with ss 5 and 6 of the Government Proceedings Act 1956, to wit:

> 5. Liability of the Government in Tort
>
> Subject to this Act, the Government shall be liable for any wrongful act done or any neglect or default committed by any public officer in the same manner and to the same extent as that in which a principal, being a private person, is liable for any wrongful act done, or any neglect or default committed by his agent, and for the purposes of this section and without prejudice to the generality thereof, any public officer acting or purporting in good faith to be acting in pursuance of a duty imposed by law shall be deemed to be the agent of and to be acting under the instructions of the Government.
>
> 6. Limits of Liability of the Government
>
> (1) No proceedings shall lie against the Government by virtue of section 5 in respect of any act, neglect or default of any public officer, unless proceedings for damages in respect of such act, neglect or default would have laid against such officer personally.
>
> (2) Any written law which negatives or limits the amount of the liability of any public officer in respect of any act, neglect or default committed by that officer shall, in the case of proceedings against the Government under section 5 in respect of such act, neglect or default of such officer, apply in relation to the Government as it would have applied in relation to such officer if the proceedings against the Government had been proceedings against such officer.
>
> (3) No proceedings shall lie against the Government by virtue of section 5 in respect of anything done or omitted to be done by any person while discharging or purporting to discharge any responsibilities of a judicial nature vested in him, or any responsibilities which he has in connection with the execution of judicial process.
>
> (4) No proceedings shall lie against the Government by virtue of section 5 in respect of any act, neglect or default of any public officer, unless that officer was at the material time employed by the Government and paid in respect of his duties as an officer of the Government wholly out of the revenues of the Government, or any fund certified by the appropriate financial officer for the purposes of this subsection or was at the material time holding an office in respect of which the appropriate financial officer certifies that the holder thereof would normally be so paid.
>
> (5) For the purposes of subsection (4) the expression 'appropriate financial officer' means, in respect of the Federal Government, the Minister of Finance, and in respect of the Government of a State, the State Financial Officer, and, in the case of the States of Sabah and Sarawak, the State Minister responsible for finance.

[109] The interpretation of both ss 5 and 6 was made clear in the Federal

Court case of *Kerajaan Malaysia & Ors v Lay Kee Tee & Ors* [2009] 1 MLJ 1; [2009] 1 CLJ 663 where Nik Hashim FCJ held:

> Thus I entirely agree with the views expressed by Abdul Aziz J (later FJ) in *Haji Abdul Rahman*. Contrary to the finding of the Court of Appeal, Haji Abdul Rahman was correctly decided and should be upheld. Therefore, on the proper construction of ss 5 and 6 of Act 359, in any claim in tort against the Government who was responsible for the alleged tortuous act must be a party and his liability be established before the Government can be made vicariously liable as principal. It would be insufficient to merely identify the officer without joining the officer as a party because liability by evidence needs to be established. It is only upon a successful claim against the officer personally can a claim be laid against the Government.
>
> In the present case, all the eight causes of actions are action in tort or tort-based premised on the act or omission of an individual. None of the Governments sued is capable of committing the wrong pleaded. *Since the Governments' liability in tort can only be vicarious by virtue of ss 5 and 6 of the Act 359, and as officers who were responsible for the alleged wrongdoing were not joined as defendants to the action, it is therefore not possible in law to maintain a successful claim in tort against the Government as primary tortfeasors. That being so, the applicant's application to strike out the respondents' actions is meritorious ... In this respect, I agree with the appellants that this is not just a case of joining wrong parties but bringing an action against the wrong parties* ... (Emphasis added.)

[110] The Court of Appeal subsequently in *Government of the State of Sabah v Syarikat Raspand* [2010] 5 MLJ 717; [2010] 7 CLJ 945 adopted the same position and Low Hop Bing JCA stressed:

> Section 6 expressly prohibits the bringing of any proceedings against the government for damaged under s 5 unless the action for such wrongful act, neglect or default would have laid against the officer personally. *This is a substantive provision that goes to the jurisdiction of the court. Liability can only be attributed to the government where the officer's act, neglect or default is proved to have established the liability for the officer personally. In the absence of the officer's liability (which can only arise and bind the officer(s) if and when the officer or officers are cited as defendants), no proceedings shall lie against the government.* Where no such proceedings could lie against the government, the court is in no position to exercise any jurisdiction in relation thereto. (Emphasis added.)

[111] The plaintiff had not named and included the relevant officers of the 16th defendant and 19th defendant that were allegedly negligent in this action. This omission per se is fatal to the plaintiff's case in limine. It is in effect not only procedural but a substantive requirement that goes to the jurisdiction of the court.

[112] That notwithstanding, I will nevertheless deal with the other procedural defence of limitation canvassed by the 16th defendant and 19th

defendant. The relevant provision here in sub-s 2(a) of the Public Authorities Protection Act 1948, to wit:

> 2. Protection of persons acting in execution of statutory of other public duty
>
> Where, after the coming into force of this Act, any suit, action, prosecution or other proceeding is commenced in the Federation against any person for any act done in pursuance or execution or intended execution of any written law or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authority the following provisions shall have effect-
>
> *(a) the suit, action, prosecution or proceeding shall not lie or be instituted unless it is commenced within thirty-six months next after the act neglect or default complained of or, in the case of a continuance of injury or damage, within thirty-six months next after the ceasing thereof; ...* (Emphasis added.)

[113] The 16th and 19th defendants accordingly relied on the dicta of Wan Suleiman FJ in *Haji Hussin bin Haji Ali & Ors v Datuk Haji Mohamed bin Yaacob & Ors and connected cases* [1983] 2 MLJ 227 at p 231; [1983] CLJ(Rep) 165 at p 167:

> *We need not go further than to refer to the judgment of this court in Tio Chee Hing & Ors v Government of Sabah* [1981] 1 MLJ 207 *where this court referring to the Court of Appeal decision in Riches v Director of Public Prosecutions* [1973] 2 AER 935 *which decided that where it is clear that the defendant was going to rely on the statute of limitations and there was nothing before the court to suggest that the plaintiffs could escape from it, the claim would be struck out.* An extract from the judgment of Davies LJ at p 939 is relevant:
>
> In the light of those more recent authorities I think, as I say, that perhaps the observations of this court in *Dismore v Milton* went too far. I do not want to state definitely that, in a case where it is merely alleged that the statement of claim discloses no cause of action, the limitation objection should or would prevail. In principle, I cannot see why not. If there is any room for an escape from the statute, well and good; it can be shown. But in the absence of that it is difficult to see why a defendant should be called on to pay large sums of money and a plaintiff be permitted to waste large sums of his own or somebody else's money in an attempt to pursue a cause of action which has already been barred by the statute of limitations and must fail. (Emphasis added.)

[114] Nevertheless, the plaintiff responded that the applicable provision was s 9 of the Limitation Act 1953. I am however unable to accept the plaintiffs contention for two reasons. Firstly the Public Authorities Protection Act is a specific statute for protection of persons in the execution of statutory and public duties such as the 16th and 19th defendants herein and therefore overrides the Limitation Act 1953 which is of more general application. secondly the cause of action of the plaintiff against the 16th and 19th defendants was for negligence and not recovery of land.

[115] The alleged acts of negligence are as summarised in para (105) herein, the latest transactional act amongst them being the transfer and registration of the land in the name of the first defendant on 15 March 2000. This date would be the effective accrual date of the cause of action based on the reasoning of the Court of Appeal in *Ambank (M) Bhd v Abdul Aziz Hassan & Ors* [2010] 3 MLJ 784 at p 800; [2010] 7 CLJ 663 at p 680 where Abdul Malik Ishak JCA held:

> [34] It is trite law that a cause of action founded in tort accrues when the appellant suffers damage (*Goh Kiang Heng v Mohd AH Abd Majid*).
>
> [35] According to the case of *Forster v Outred & Co* [1982] 1 WLR 86, (CA), it was necessary to prove actual damage in order to constitute a cause of action in negligence and that on the pleaded facts the plaintiff had suffered actual damage through the defendant's negligence by executing a mortgage deed whereby her property was encumbered with a legal charge and she was subjected to a liability which might mature into a financial loss; and that, therefore, her cause of action accrued in February 1973 notwithstanding that she did not actually become liable for the repayment of the loan until the demand was made and, accordingly, the second writ was issued outside the six years' limitation period and the action begun by the first writ was rightly dismissed.
>
> [36] Nourse J, in *Melton v Walker and Stanger* [1981] 125 Sol Jo 861 applied the case of *Forster v Outred & Co* and came to the same conclusion to the effect that a cause of action founded in tort accrued when the plaintiff suffered damage and that the cause of action was completed on 7 April 1967...
>
> *[39] Applying all these salient authorities to the appeal at hand, it is our judgment that on the facts as pleaded the appellant would have suffered damage when the third party assignment was executed because the appellant would have, on that date, been encumbered with the liability of dispensing the loan to the borrower in exchange for an invalid third party assignment.* It is also our judgment, on the available evidence, that the appellant's loss would have crystallised the moment the loan sum was disbursed to the borrower in early April 1999 in exchange for an invalid third party assignment. Time started to move from 6 April 1999. (Emphasis added.)

[116] Thus, by analogy, the relevant date was the date of registration when the plaintiff effectively suffered actual damage of loss or ownership in the land. In my view, the phrase 'continuance of injury or damage' is therefore inapplicable here unlike say in a continuing nuisance of pollution emitted or in the case of a continuing licence as held in *Director of Forests Sarawak & Anor v Balare Jabu & Ors and Another Appeal* [2012] 7 CLJ 685 (FC).

[117] The other complaint on the non entry of a registrar's caveat occurred later when the plaintiff on 29 January 2004 notified the land administrator of the problems encountered in respect of the land.

[118] Although the 16th and 19th defendants were added as parties in 2012 and 2014 respectively, they were deemed parties as at 19 April 2005 when the

writ to this action was filed by virtue of the doctrine of relation back. A

[119] In the premises, it is plain that save for the allegation of non entry of the registrar's caveat, the limitation period of 36 months from 15 March 2000 had expired when the writ was filed on 19 April 2005 as far as it concerned the 16th and 19th defendants. B

[120] As for the substantive defences of the defendants, I accept the contentions of the 16th defendant there was no involvement whatsoever on his part. He was at all material times based in at the office of the lands and minerals department in Shah Alam. All the relevant transactions took place at the Kuala Langat district office as evidenced from the relevant written communications between the parties. This was not rebutted by the plaintiff. Accordingly, the plaintiff's claim against the 16th defendant is unsustainable. C D

[121] In respect of the 19th defendant, the plaintiff alleged that the 19th defendant permitted the situation where both manual and computerised issue document of titles of the land to be concurrently in existence in contravention of the Fourth Schedule of the National Land Code. The plaintiff circumstantially relied on the fact that the 19th defendant had on 28 April 2004 given the manual issue document of title to the first defendant's solicitors and the further fact from the subsequent correspondence of the 19th defendant on 27 December 2004 that the computerised issue document of title of the land was still with the 19th defendant. It could equally in my view be possible that the computerised issue document of title was produced between 28 April 2004 and 27 December 2004 that would explain why the later computerised title remained in the file whilst the manual title earlier sent out was in existence in the public domain. This computerised title would therefore be destroyed if and when IDT2 or even IDT1 was handed to the 19th defendant based on the Fourth Schedule. I am mindful that DW9 admitted at trial that it was an oversight on the part of the 19th defendant. He did not however have direct personal knowledge of the actual fact. It appeared to me that his admission was extracted ex tempore out of logic as suggested by counsel of the plaintiff. I am therefore unable to conclude that the plaintiff has sufficiently discharged her burden of proof here on the balance of probabilities. E F G H

[122] As to the plaintiff's assertion that the 19th defendant had wrongly issued the fake title IDT2, I have found in para (48) herein this was not the case as a matter of fact. On the plaintiff's non deployment of any personnel to check and authenticate the validity of the land titles that were presented for registration and thereby allowed the fake title IDT2 to be used to transfer the land, I am of the view that there was no duty of care on the part of the 19th defendant to do so and the plaintiff had not submitted any case authority to convince me otherwise. From the provisions of the National Land Code, it is I

my view that the duty, if any, should by owed by the officer designated in s 211 read with the Fifth Schedule of the National Land Code, often the conveyancing advocate and solicitor who attested to the instruments of transfer and charge creation. The function of the land office was merely administrative to register the title or interest so long the requisite instruments and documents as presented were complete.

[123] The plaintiff also contended that the 19th defendant ought not to have registered the transfer of the land from the plaintiff to the first defendant by virtue of the private caveat seen endorsed in IDT2. This is plainly misconceived by reason that the private caveat of the plaintiff seen in IDT2 entered on 30 October 1984 and removed on 12 December 1985. Thus the caveat was neither applicable nor in force at the material time the transfer of the land was made to the first defendant in 2000.

[124] Finally and in regard to the plaintiff's contention that the 19th defendant failed to enter a registrar's caveat to protect the plaintiff's interest in the land, I am of the view that it was the discretion of the 19th defendant whether to enter the caveat or otherwise as provided in s 319(1)(a) of the National Land Code. The appropriate relief against the 19th defendant's refusal or failure to enter the registrar's caveat in my view was not to commence an action in negligence but to file an application to the court pursuant to s 418 of the National Land Code. However, the plaintiff did not file any such application.

[125] In the circumstances, I find and hold that the plaintiff's case against the 16th defendant and 19th defendant were not maintainable both from the procedural as well as the substantive aspects as contended by them. Thus it is also unnecessary for me to consider the applicability of immunity under s 22 of the National Land Code.

SUMMARY OF FINDINGS

[126] To recapitulate, I have found and held principally as follows:

(a) the title IDT2 that was used to convey the land to the first defendant was not void ab initio.

(b) the second defendant forged or caused the forgery of the signature of the plaintiff in the power of attorney. He 'engineered and manufactured' IDT2. The sale and purchase agreement dated 25 January 2000 and memorandum of transfer of the land were signed by him on behalf of the plaintiff pursuant to the power of attorney without the authorisation of the plaintiff. These were calculated to defraud the plaintiff;

(c) the first defendant neither conspired with the second defendant nor a

party to the fraud of the second defendant;

(d) nevertheless, the transfer and registration of the land in the name of the first defendant was defeasible and avoided pursuant to s 340(2)(b) of the National Land Code by reason of the forgery and usage of insufficient and/or void instruments;

(e) the seventh defendant was the bona fide purchaser of the land from the first defendant and the registration of the land in the name of the seventh defendant was therefore indefeasible pursuant to the proviso in s 340(3) of the National Land Code;

(f) the tenth defendant was also the bona fide purchaser of the land from the seventh defendant. Hence, the registration of the land in the name of the tenth defendant was also indefeasible pursuant to the proviso in s 340(3) of the National Land Code . In addition, the plaintiff was debarred from pursuing her claim against the tenth defendant because of laches and acquiescence;

(g) accordingly, the 14th defendant was the bona fide chargee of the land and the registration of the charge in the name of the 14th defendant was also indefeasible pursuant to the proviso in s 340(3) of the National Land Code;

(h) the 15th defendant neither in conspired with the second defendant nor a party to the fraud of the second defendant; and

(i) the 16th defendant and 19th defendant were not negligent. In addition, the plaintiff was debarred from pursuing her claim against them because of non compliance with ss 5 and 6 of the Government Proceedings Act 1956 and limitation pursuant to s 2 of the Public Authorities Protection Act 1948.

CONCLUSION

[127] This is a sad day for the plaintiff because the land could not be re-vested upon her due to the act of a fraudster unknown to her, to wit, the second defendant. Going by the law, her remedy is only in damages against the fraudster and her former solicitors who misadvised her in the court proceedings relating to the removal of her private caveat on the land. The latter was pursued and dealt with in the judgment of Shah Alam High Court suit No 22 NCVC-104–10 of 2012 dated 6 November 2013.

[128] In the premises and for the aforegoing reasons, the declarations, ancillary orders and damages prayed by the plaintiff in para (49) of the re-amended statement of claim against the seventh, tenth, 14th, 15th, 16th and 19th defendants are dismissed.

[129] As for the first defendant, I only allow the declaration in prayer (d) of para (49) that the registration of the title of the land in the name of the first defendant was void, invalid and had no effect. For the avoidance of doubt, there is however no order for the other declarations and ancillary orders as sought. There is also no order for payment of damages by the first defendant.

[130] In respect of the second defendant, I order that judgment be entered against the second defendant for payment of damages to the plaintiff to be assessed by the registrar together with interest at 5%pa from 5 January 1996 till full realisation pursuant to s 11 of the Civil Law Act 1956.

[131] As to costs, I reserve for further submission by the parties particularly on the applicability of a Bullock or Sanderson order.

Order accordingly.

Reported by Ashok Kumar